Union Calendar No. 866

94th Congress, 2d Session - - - - - - - - House Report No. 94-1738

RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT

A REPORT

OF THE

AD HOC SUBCOMMITTEE ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND RELATED MATTERS

OF THE

COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

TOGETHER WITH

ADDITIONAL VIEWS

SEPTEMBER 30, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTERS OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, D.C., September 30, 1976.

Hon. CARL ALBERT,
The Speaker,
House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: Transmitted herewith is a report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters entitled "Recent Efforts to Amend or Repeal the Robinson-Patman Act."

This report is submitted with the approval of the full Committee.

With kindest regards and best wishes, I am

Very sincerely yours,

TOM STEED,
Chairman.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
AD HOC SUBCOMMITTEE ON ANTITRUST,
THE ROBINSON-PATMAN ACT, AND RELATED MATTERS,
Washington, D.C., September 24, 1976.

Hon. TOM STEED,
Chairman, Committee on Small Business,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Transmitted herewith is a report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters entitled "Recent Efforts to Amend or Repeal the Robinson-Patman Act."

The report, transmitted to you as Chairman of the Committee on Small Business, has the approval of the Subcommittee.

Sincerely yours,

HENRY B. GONZALEZ,
Chairman.

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RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT

SEPTEMBER 30, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STEED of Oklahoma, from the Committee on Small Business, submitted the following

REPORT

TOGETHER WITH

ADDITIONAL VIEWS

RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT

Chapter I. Introduction

On September 24, 1975, Representative Joe L. Evins (D-Tenn.), Chairman of the full Committee on Small Business, announced the establishment of a special Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters.

This special Subcommittee was established as a result of widespread concern regarding persistent efforts to repeal or weaken the Robinson-Patman Act and because of the impact of the growth of giantism and anticompetitive pressures on this Nation's 9½ million small businessmen.

Chairman Evins appointed Representative Henry B. Gonzalez (D-Tex.) as Chairman of the new Subcommittee and Representative James M. Hanley (D-N.Y.) as Vice Chairman.

Subcommittee Chairman Gonzalez noted the fact that Chairman Evins promptly responded to requests from various Members of the House and urgings by small business groups that the Small Business Committee consider this important matter.

In addition to Subcommittee Chairman Gonzalez and Vice Chairman Hanley, the other Members are: Rep. John Breckinridge (D-Ky.), Rep. John J. LaFalce (D-N.Y.), Rep. Frederick W. Richmond (D-N.Y.), Rep. Martin A. Russo (D-Ill.), Rep. M. Caldwell Butler (R-Va.), Rep. Thomas N. Kindness (R–Ohio), and Rep. William F. Goodling (R-Pa.).

Chairman Evins and Rep. Silvio O. Conte (R-Mass.), Ranking Minority Member of the full Committee, are ex-officio Members of the Subcommittee.

In a press release dated November 3, 1975, Subcommittee Chairman Gonzalez stated:

> Under the Rules of the U.S. House of Representatives, the Committee on Small Business has "the function of studying and investigating, on a continuing basis, the problems of all types of small business. It has come to the attention of the Committee that strenuous efforts are being made by certain high officials of the Executive Branch to repeal or to emasculate the Robinson-Patman Act. This well-known law, which has been characterized as the "Magna Carta of Small Business," is being subjected to renewed attack with the result that the small business sector of the economy has expressed great alarm and called for support of this important statute.

The Honorable Everette MacIntyre, a former member of the Federal Trade Commission, was retained as Special Counsel, and Dr. Justinus Gould, Deputy General Counsel of the full Committee, was assigned to this investigation.

Chapter II. Hearings

A. Dates of Hearings and Witnesses Who Appeared

The hearings started in Washington, D.C. on November 5, 1975, at which time Subcommittee Chairman Gonzalez, in his opening statement, said in part:

> The widely reported efforts on the part of some officials of the Antitrust Division of the Department of Justice to urge and persuade others to support their views to amend or repeal the Robinson-Patman Act have resulted in a very strong and negative response from representatives of small business who have not only expressed their deep concern, but also their own alarm that an important law—the Robinson-Patman Act—is again under severe attack. The press has reported the reaction of organizations of small businessmen.
>
> I wish to invite attention to the recorded facts that the Robinson-Patman Act was enacted as a bipartisan law and as a *non-partisan measure* and was supported by both Democrats and Republicans. In fact, it passed the Congress with practically no opposition. * * *
>
> However, before we begin, I deem it helpful to reiterate the clearly expressed policy of the Congress as stated in the United States Code, Title 15, Section 631(a), which is, in part, as follows: "* * * It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns * * *"

In pursuance of that policy and in light of the fact that the Committee received communications from Members of the House regarding their respective constituents' fears that a law for such constituents' economic protection is threatened by powerful forces, the Committee, through its Ad Hoc Subcommittee began hearings.

The dates of the hearings held and the witnesses who appeared or submitted statements are as follows:

1. November 5, 1975—

   Hon. Wright Patman, a Representative in Congress from the First Congressional District of the State of Texas.

   Hon. J. J. Pickle, a Representative in Congress from the Tenth Congressional District of the State of Texas.

   John E. Lewis, Executive Vice President, National Small Business Association, Washington, D.C.

2. November 6, 1975—

   John E. Lewis, Executive Vice President, National Small Business Association, Washington, D.C.

   Lee Richards, President, National Independent Dairies Association and President, Hygeia Dairy Company, Harlingen, Texas.

Watson Rogers, President Emeritus, National Food Brokers Association, Washington, D.C.

Douglas W. Wiegand, Director of Governmental Affairs, Menswear Retailers of America, Washington, D.C.

Sheldon I. London, Vice President, Home Furnishings Association, Washington, D.C. (Note: Mr. London also represents National Retail Hardware Association, Retail Jewelers of America, National Association of Music Merchants, Retail Floorcovering Institute, Photo Marketing Association.)

William E. Woods, Washington Representative, National Association of Retail Druggists, Washington, D.C.

James D. "Mike" McKevitt, Washington Counsel, National Federation of Independent Business, Washington, D.C.

Jefferson D. Keith, Executive Vice President, National Tire Dealers and Retreaders Association, Inc., Washington, D.C.

3. November 11, 1975—

Earl W. Kintner, Esq., Arent, Fox, Kintner, Plotkin and Kahn, Washington, D.C.; accompanied by: Lawrence F. Henneberger, Esq., and Marc L. Fleischaker, Esq.

4. November 12, 1975—

Jim C. Page, President, Page Milk Company, Coffeyville, Kansas, and Tulsa, Oklahoma (Past President, now Chairman of the Legislative Committee, National Independent Dairies Association; Member of the Board of Directors, Milk Industry Foundation).

Phil Simpson, Chairman of the Board, and O. Max Montgomery, President, Republic Housing Corporation, Dallas, Texas.

Levoy Ellsworth, President, Elex Transportation, Inc., Tulsa, Oklahoma.

A. G. W. Biddle, President, Computer Industry Association, Arlington, Virginia.

5. November 19, 1975—

Hon. Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice.

Hon. Joe Sims, Deputy Assistant Attorney General, Antitrust Division, Department of Justice.

6. December 10, 1975—

Basil J. Mezines, Esq., Attorney at Law, Counsel for the Automotive Warehouse Distributors Association (AWDA), Washington, D.C.; accompanied by:

John N. Yantis, President, Motive Parts, Warehouse Division, Mid-America, Industries, Inc.

Sherwyn E. Syna, Esq., Attorney at Law, Counsel for The NAWCAS Guild, Atlanta, Georgia.

Stewart W. Pierce, Richmond, Virginia, (former Traffic & Distribution Manager).

Claude Huckleberry, Texas Gypsum Company, El Paso, Texas.

7. December 11, 1975—

Hon. Thomas J. Downey, Representative, Second Congressional District of New York.

Harmon Schepps, President, Susquehanna Valley Farms Dairy, Williamsport, Pennsylvania.

John Burn, President, Carolina Dairy, Inc., Shelby, North Carolina.

N. D. Brookshire, Jr., President, Brookshire Dairy Products Company, Meridian, Mississippi.

Leo Soehnlen, President, Superior Dairy, Inc., Canton, Ohio.

8. January 26, 1976—

Federal Trade Commission, Washington, D.C.: Robert J. Lewis, Esq., General Counsel; Owen M. Johnson, Esq., Director, Bureau of Competition; Dr. Frederic M. Scherer, Director, Bureau of Economics; Mr. James M. Folsom, Deputy Director, Bureau of Economics; Mark Grady, Esq., Acting Director, Office of Policy Planning and Evaluation; Daniel C. Schwartz, Esq., Assistant Director for Evaluation, Bureau of Competition; Harry A. Garfield II, Esq., Assistant Director, Bureau of Competition; Bartley T. Garvey, Esq., Office of the General Counsel; Hon. Ernest G. Barnes, Assistant Chief Administrative Law Judge; Eugene A. Higgins, Esq., Bureau of Competition.

9. January 27, 1976—

Federal Trade Commission personnel: Robert J. Lewis, Esq., General Counsel; Owen M. Johnson, Jr., Esq., Director, Bureau of Competition; Dr. Frederic M. Scherer, Director, Bureau of Economics; Mr. James M. Folsom, Deputy Director, Bureau of Economics; Mark Grady, Esq., Acting Director, Office of Policy Planning and Evaluation; Daniel C. Schwartz, Esq., Assistant Director for Evaluation, Bureau of Competition; Harry A. Garfield II, Esq., Office of General Counsel; Hon. Ernest G. Barnes, Assistant Chief Administrative Law Judge; Eugene A. Higgins, Esq., Bureau of Competition.

Jerrold G. Van Cise, Esq., Cahill, Gordin and Reindel, New York, New York.

Paul H. La Rue, Esq., Chadwell, Kayser, Ruggles, McGee and Hastings, Chicago, Illinois.

10. January 28, 1976—

Dr. Vernon A. Mund, Professor of Economics Emeritus, University of Washington, Seattle, Washington.

Dr. Ronald H. Wolf, Professor of Economics, University of Tennessee, Knoxville, Tennessee.

11. February 2, 1976—

Federal Trade Commission, Washington, D.C.: Hon. Paul Rand Dixon, Acting Chairman; Hon. Stephen Nye, Commissioner; Hon. M. Elizabeth Hanford Dole, Commissioner.

12. February 4, 1976—

Francis C. Mayer, Esq., Attorney, Bureau of Competition, Federal Trade Commission, Washington, D.C.

13. February 26, 1976—

James W. Heizer, Executive Secretary, Virginia Gasoline Retailers Association, Inc., Richmond, Virginia.

Homer A. Lamey, President, Bexar County Pharmaceutical Association, San Antonio, Texas.

Tim L. Vordenbaumen, on behalf of the Bexar County Pharmaceutical Association, San Antonio, Texas.

14. March 23, 1976—

Hon. Henry B. Gonzalez, Representative in Congress from the State of Texas; Chairman, Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters.

Testimony of Erma Angevine, Executive Director, Consumer Federation of America, February 6, 1970.

Hon. Virginia H. Knauer, Special Assistant to the President for Consumer Affairs, The White House Office, Washington, D.C.

B. OTHER MATTERS INCLUDED IN THE RECORD FOR REFERENCE

On the first day of hearings of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters, November 5, 1975, following the testimony of the late Wright Patman, co-author of the Robinson-Patman Act, Congressman J. J. Pickle (D-Tex.) testified as follows: [1]

> Mr. PICKLE. I hope, Mr. Chairman, I can help you in this study because, during the 93d Congress, I reviewed these matters in great detail. As ranking majority member of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, I chaired a number of both open and closed hearings examining the FTC's work in enforcing the act. Part of this work necessitated participating with the subcommittee staff in preliminary and followup investigations.

Due to the obvious connections between the hearings mentioned by Congressman Pickle and the hearings of this Ad Hoc Subcommittee, the printed record of those proceedings held on March 13, July 18 and 23, 1974, are included by reference; they are entitled "Federal Trade Commission Practices and Procedures."

Also, during the hearings of this Ad Hoc Subcommittee, other various Congressional hearings and reports were included by reference and should likewise be considered as part of the record of this investigation.[2]

The record of the public hearings held are printed in three volumes containing a total of 1,218 pages. When these pages are reviewed and the other hearings, records and reports pertaining to the Robinson-Patman Act and the practice of price discrimination as hereinbefore noted by reference and included as part of the record of these hearings by this Ad Hoc Subcommittee, then it clearly reflects the fact that all the studies, investigations, hearings and reports regarding this subject are, perhaps, among the most intensive and extensive ever made by Congress on antitrust.

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[1] Hearings, pt. 1 ,p. 20.
[2] Hearings, pt. 3, pp. 199–200.

Chapter III. Public Policy Regarding Antitrust and Small Business

A. IN GENERAL

The United States is a great Nation and the American people are firmly committed to the high ideals of democracy and to the free enterprise system.

Governments are instituted among men to serve mankind. "The end of law," as John Locke, the English philosopher, whose works served as an inspiration to the framers of the United States Constitution, said "is not to abolish or restrain, but to preserve and enlarge freedom." Thus some legislation is absolutely necessary to prevent unfair methods of competition as unfair competition is the seed from which monopoly sprouts. In the life of a community, the whole is greater than any of its parts and political freedom cannot survive if economic freedom is lost. An article of faith lies at the very roots of American political and economic philosophy, that undue concentrations of power are inherently destructive of the aims of a free society.

B. GENESIS OF ANTITRUST

The concept of antitrust legislation is not something new or of comparative recent origin. In fact, the evils of monopolies have even been judicially recognized since the early days of the Common Law. The earliest reported case on the subject is that of *Darcy* v. *Allen*[1] which was decided in the year 1602. This was followed in 1623 with the passage of the *Statute of Monopolies*[2] which declared monopolies to be contrary to law and void. For more than three centuries, the salutary rule discountenancing and penalizing monopolies and trade restraints has remained unchanged.[3]

The reasons assigned for holding monopolies unlawful may be summarized as follows: (1) Because a monopoly tends to prevent competition and increases the price of the article monopolized;[4] (2) It tends to deteriorate the quality of a commodity or service to which the monopoly relates;[5] and (3) It has a tendency to deprive persons who otherwise would be employed of their means of livelihood.[6]

C. POLICY OF LAISSEZ FAIRE

In the consideration of the subject of this report, namely "Recent Efforts to Amend or Repeal the Robinson-Patman Act," it would ap-

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[1] 11 Coke 84b, 77 Reprint 1260.
[2] St. 21 James I c. III.
[3] See *Addyston Pipe & Steel Co.* v. *United States*, opinion by William Howard Taft, 85 Fed. 271 (6th 1898); on appeal 175 U.S. 211 (1899).
[4] *Monopolies Case*, 11 Coke 84b, 77 Reprint 1260. See also *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).
[5] *Monopolies Case, supra.*
[6] *Standard Oil Co.* v. *United States, supra.*

pear that the theory of *laissez faire* after a full two hundred years is again making itself felt. It was in 1776 that Adam Smith wrote his monumental work entitled "*The Wealth of Nations*," which in essence advocated the thesis that the public welfare is best served by leaving enterprisers free to manage their own affairs and businesses in their own way, and that governmental interjection or impact is to be avoided.

The resurgence of this conservative doctrine with regard to the Robinson-Patman Act has reappeared under the euphemistic guise "regulatory reform." Great economists later sharply disagreed with the old *laissez faire* doctrine and demonstrated the necessity for governmental protection of free and fair competition. But there is no clear-cut dichotomy of views respecting this matter, and the question naturally arises as to the quantum or extent of laws needed to serve the Nation as a whole.

The above-mentioned diversity of views have led to confusion regarding the antitrust policy. Therefore, this Subcommittee's investigations and hearings considered in this report reflect a clear attempt on the part of certain persons to emasculate, weaken and even repeal a basic and important part of this Nation's antitrust laws. Further, as will be shown in another chapter of this report, those interested in the attempt to do-away with the Robinson-Patman Act utilized a method long familiar to knowledgeable rhetoricians, namely denominating a certain thing with another name which, in this instance, is called "regulatory reform" to make it sound as being desirable.

D. CONCERN FOR SMALL BUSINESS—AN AMERICAN TRADITION

The importance of small business in a free enterprise system has been recognized by all Presidents and Congresses, dating all the way back to the times of George Washington and Thomas Jefferson.

If one believes in private initiative, one must acknowledge the right of small business to exist. Also, it must be admitted that the destruction of the opportunity of the small businessman of any given industry to compete inexorably follows the concentration of control of such industry into a few number of dominating corporations.

The contributions of small business to the American economy and society are many and the following points merit special attention:

1. The existence of a large number of small, independent businesses helps to preserve competition, thus insuring increased efficiency and high quality and reasonable prices for consumers.
2. A large number of small independent businesses decreases the likelihood of excessive economic and political control.
3. Small business offers an opportunity for the expression and growth of personal initiative and individual judgment.
4. Small business is frequently the source of new products and new methods.
5. Small business constitutes a large and diversified source of employment opportunities.
6. Certain services essential to the economy can be performed best by small business.

Small business accounts for 97 percent of all non-farm businesses in the United States, for nearly one-half of the gross national product

(GNP), and nearly three-fifths of all non-farm private employment. Small business is labor intensive and any growth in sales translates immediately into jobs. An 18 percent rise in sales over a recent four year period translated into a 62 percent increase in small business employment. About one hundred million Americans own, work for, or are supported by small business. Thus, small business is indeed a very large part of the United States as a Nation. It sustains the economy of small communities and supports and diversifies the economy of the large cities. The small business sector is vital to a healthy economy and the preservation of the free enterprise system.

Lewis Corey, in commenting on the American Dream, wrote:

> Out of this society of small producers rose the American Dream. It was a dream of liberty and progress moving irresistibly onward to new and higher fulfillment. Most vital was the ideal, determining all the other ideals, of the liberty and equality of men owning their independent means of livelihood.[7]

E. FEDERAL ANTITRUST LAWS—A BASIS FOR ECONOMIC FREEDOM

With the passage of the Sherman Act [8] in 1890, the Congress of the United States evinced its determination to eradicate the abuses of monopoly in the national economy and provide safeguards for the private enterprise system. This first Federal antitrust law originated in an era of trusts and combinations when predatory and monopolistic interests openly sought to control the marketplace by the suppression of competition and the elimination of competitors. Most Americans have long recognized that opportunity for market access and the fostering of market rivalry are the basic tenets of the people's faith in competition as a form of economic organization.

The Sherman Act was augmented by the Clayton Act [9] in 1914, the Federal trade Commission Act,[10] and in 1936, by the Robinson-Patman Act [11] among other. There has thus been created over the years by the Congress, and by the courts through judicial interpretation, a body of law forming the basis for economic freedom and a competitive business climate. As a direct result, the essentials of antitrust are proclaimed by both of the leading political parties as being absolutely essential and necessary.

The founder of the National Federation of Independent Business, Mr. C. Wilson Harder has been quoted [12] as stating the antitrust laws

> * * * are the real weapons of democracy and those who seek to destroy them deserve no more consideration from their fellow citizens than any other wartime saboteur.

---

[7] Lewis Corey: *The Crisis of the Middle Class* (New York: Covici-Friede; 1935), op. cit., p. 113.
[8] 15 U.S.C. 1–7.
[9] 15 U.S.C. 12 ff.
[10] 15 U.S.C. 41–58.
[11] 15 U.S.C. 13, 13a, 13b, 21a. This amended the Clayton Act.
[12] John H. Bunzel, "The American Small Businessman," p. 264 (1962).

F. DECLARATION OF CONGRESSIONAL INTENT

The Congress has clearly expressed its intent and policy respecting small business in the following language: [13]

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concern [14] in order to preserve free competitive enterprise, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

In the Small Business Act, quoted above, the public policy of the United States is unequivocably declared.

Although public officials, political scientists and many others throughout the history of this Country recognized and acknowledged the concept that small business enterprises are necessary to the maintenance and survival of America's free and competitive enterprise system, it was not until President Eisenhower signed into law the Small Business Act as passed by the 83d Congress in 1953, that such policy regarding small business was expressly spelled out in the words of a statute.[15]

In 1958, the Small Business Act [16] was reenacted to convert the Small Business Administration into a permanent establishment expressly authorized to assist small business in meeting all problems, including those which have no relation to national defense. This change in the character of the SBA resulted from the recognition by the President and the Congress that it was advisable to stablize and strengthen the small business program and to extend its operation into the peacetime economy.

G. PRESIDENTIAL RECOGNITION

The President of the United States as recently as May 13, 1976, in his Bicentennial Salute to Small Business, stated before a large gathering of representatives of small enterprises, his expression and recognition of the concept of the vital importance of small business to the competitive free enterprise system and also for antitrust.

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[13] Small Business Act, sec. 2(a), 15 U.S.C. 631(a).

[14] Similar declarations of Congressional Policy in following statutes: Armed Services Procurement Act of 1947—10 U.S.C. 2301; Communications Satellite Act of 1962—47 U.S.C. 721(c)(1); Defense Appropriation Act of 1969—P.L. 90–580, sec. 508; Defense Production Act of 1950—50 U.S.C. 2151(a); Federal Aid Highway Act of 1958—23 U.S.C. 304; Federal Property & Administrative Services Act of 1949—41 U.S.C. 252(b); Foreign Assistance Act of 1961, sec. 602—22 U.S.C. 2352; National Aeronautics & Space Act— 42 U.S.C. 2473(a)(5); Universal Military Training & Services Act of 1958—50 U.S.C. App. 468(a).

[15] Public Law 163—83d Cong. Title II, sec. 202.

[16] Public Law 85—536, July 18, 1958.

President Ford stated:

> In the earliest days of American history, small businessmen and women were among the first to revolt against the tyranny and oppression of a far-away government.
>
> Seeking the freedom to control their own lives and economic destinies, hundreds of merchants and shopkeepers and craftsmen helped wage and win the fight for America's independence.
>
> With that independence, small business has played a major role in building America to greatness in the two centuries that have followed.
>
> You account for 97 percent of all non-farm businesses in America, for nearly half the gross national product, and nearly three-fifths of all non-farm private employment. About 100 million Americans own, work for, or are supported by small business.
>
> As I said in my Small Business Week proclamation earlier this year, "small businesses are the cornerstone of the American economy."

Small Business Week, 1976, was formally proclaimed by the President in the following terms: [17]

A PROCLAMATION

> Small businesses are the cornerstone of the American economy. They stand as a symbol of American character and spirit. The traits of individual initiative, self-reliance and creativity we prize so highly, as exemplified by our small business men and women, have always been the indispensable characteristics of a free and dynamic people.
>
> Small businesses, seeking new opportunities, have provided us with a vast array of goods and services that enable us to enjoy a standard unequalled in the world. The nearly ten million small businesses throughout the United States provide fifty-eight percent of our business employment and a livelihood for millions of Americans. More important, small business continues to provide the avenue by which so many have made the American dream of a better life for themselves and their families a reality.
>
> Now, therefore, I, Gerald R. Ford, President of the United States of America, do hereby designate the week beginning May 9, 1976, as Small Business Week, and I ask all Americans to join me in support of an expanding small business community.
>
> In witness whereof, I have hereunto set my hand this thirteenth day of April in the year of our Lord nineteen hundred seventy-six, and of the Independence of the United States of America the two hundredth.
>
> GERALD R. FORD.

[17] Proclamation 4129, Federal Register Vol. 41, No. 73, April 14, 1976, p. 15679.

Chapter IV. Discriminatory Practices and Price Discrimination Have Presented Serious Problems to Small Business

It was inevitable that the growth of big business would produce a reaction on the part of the independent entrepreneurs. Theodore Roosevelt, as President, sought to regulate big business. Woodrow Wilson, in his *New Freedom*,[1] attempted to restore competitive conditions in business, so that the small man might have the opportunity to economically exist.

The enormous changes which transformed this Nation into an industrial economy posed many serious problems for the small businessman. The freedom of a person to carry on the business of his choice is in the nature of a personal liberty as much as a property right. The Supreme Court stated,[2]

> This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

The antitrust laws form a basis for economic freedom and are the guardians of the free enterprise system. It was because the Congress sensed the increasing complexity of society which made the public interest and freedom of competition urgent that the Sherman Act [3] was passed in 1890. It is firmly believed that for a democracy to be strong and progressive, it must also be secure in its economic liberties.

In the early history of antitrust in the United States, it was recognized that the practices of price discrimination adversely affected the competitive enterprise system and threatened the survival of small business. Also, it is recognized that the Sherman Antitrust Act was not sufficient to deal with price discrimination and that additional legislation was needed.

The Sherman Act was the first of the series of Federal antitrust laws. It was the considered judgment of those who prompted that legislation that it would make more definite and certain the laws against monopolies and combinations in restraint of trade. That thought was based upon the language of the first section of the Sherman Act to the effect that—

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal.

And in the words of section 2 of the Sherman Act, which are to the effect that—

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[1] Compilation of papers by William B. Hale (1913).
[2] Mr. Justice Bradley's opinion, *Slaughter House Cases*, 16 Wall. 36, 116 (1873).
[3] 15 U.S.C. 1–7.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding 1 year or by both said punishments, in the discretion of the court. [3a]

In the case of the *Standard Oil Company* v. *United States* [4] the Supreme Court of the United States decided that the Sherman Act "* * * followed the language of development of the law of England." In that connection, the Court held:

> The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.
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> * * * * *
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> Thus, not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

It is seen that the Sherman Act thus interpreted is as Mother Hubbard's dress, covering almost everything but touching nothing in particular. The uncertainties inherent in such a situation were aptly described in the opinion of Justice Harlan, a member of the Supreme Court, who participated in the decision in the *Standard Oil* case. He said:

> To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act * * * And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries.* What one court or jury might deem unreasonable another court or jury might deem reason-

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[3a] 1974—Pub. L. 93–528 substituted "a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years" for "a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year".

[4] 221 U.S. 1 (1911).

> able. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable.

In a short time thereafter the Congress further considered the problem of dealing with unwholesome trade practices. Effort was made to make more certain those trade practices deemed to be unlawful. Prior to the consideration by the 63d Congress, President Wilson recognized the need for greater certainty in the law and urged in a message to the Congress that our antimonopoly laws be made clearer through a specification of some of the unlawful acts and practices. The President said:

> We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limit of which experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself, and the penalty being made equally plain.

Congress in acting upon that plea from President Wilson, strengthened antitrust laws. In 1914, it enacted the Clayton Antitrust Act [5] which included, in section 3 thereof, a prohibition against exclusive dealing contracts where the effect may be to substantially lessen competition in any line of commerce. In doing so, Congress made public-policy determinations which were spelled out in the language of this law. In effect, the Congress had legislatively found that the use of exclusive dealing contracts was unwholesome and that they should be prohibited by law in all situations where the probable effect would be to substantially lessen competition in any line of commerce.

Included in the legislation of 1914 was section 2 of the Clayton Antitrust Act which prohibits price discriminations.

A study of the debates upon these measures in Congress clearly discloses the intent of Congress to declare illegal all practices regarded as likely to promote monopolies and to get at them in their incipiency, nipping them in the bud, and forestalling an evil before its development into full bloom.

During the course of the debates, Senator Walsh of Montana, in referring to the Clayton Act, said:

> The purpose of the legislation of which the pending bill forms a part is to preserve competition where it exists, to restore it where it is destroyed and to permit it to spring up in new fields.[6]

To that end, the Clayton Act was approved October 15, 1914. Section of that act provided:

> Section 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use,

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[5] Public Law 212, 63d Congress.
[6] Congressional Record, October 5, 1914, vol. 51, p. 16.

> consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition.

The Standard Oil trust had used the practice of price discrimination along with its acquisition of competition that made it secure as a monopoly at the turn of the century. Thus Congress became aware of the need for a law which would stop a large concern from discriminating in price and securing a monopoly instead of relying upon the Sherman Act to help get rid of monopoly once it is created.

It was recognized to be the primary purpose of section 2 of the Clayton Act, as approved in 1914, to reach the practice of destroying competition through price discrimination.

Inadequate action on the part of the enforcement agencies and unfavorable decisions by the courts made the Clayton Act ineffective as a weapon against price discrimination. Therefore, in 1935, a special and select committee of the House of Representatives, investigated big scale buying and selling. Particular attention was given to the practices that were utilized in the food industry. The investigations made by that committee established beyond dispute the fact that the practice of price discrimination was widely used in the food industry and that the effect was to injure and destroy competition.

Those investigations, established facts in keeping with conclusions later reached by responsible administrative agencies representing the public interest. For example, as a result of independent investigations it conducted, the Federal Trade Commission arrived at the same conclusions. In a staff report to the Federal Trade Commission on monopolistic practices and small business, dated March 31, 1952, there appears the statement—

> Price discrimination has been a weapon of sellers who have some degree of monopoly power and can be effectively employed only by those who have such power. It is equally true that price discriminations are granted only when doing so will contribute to the maintenance or enhancement of that monopoly power or when this same power, in some degree, resides in those to whom the discriminations are granted.

Section 2 of the Clayton Act of 1914 as hereinbefore quoted was found to be inadequate to deal with injurious price discrimination as interpreted by the courts. Because it was *then* viewed as permitting destructive price discrimination granted in proportion to the quantity of merchandise or items purchased by big buyers and others, this prompted Congress to consider and enact remedial legislation in 1936.

This legislation amended the Clayton Antitrust Act and is specifically known as the Robinson-Patman Act.[7]

In the course of the consideration of the proposals for the Robinson-Patman Act, the Judiciary Committees of both the House of Representatives and the Senate, after extensive hearings, issued their respective reports. Chairman Utterback of the House Judiciary Committee stated:[8]

> In the consideration of this bill, your committee has also had before it H.R. 4995, H.R. 5062, and H.R. 10486, all dealing with price discrimination and related subjects. Extensive public hearings have been held, both during this and the last session of Congress. It has also had the benefit of hearings conducted by a committee of the House on the investigation of the American Retail Federation and large-scale buying and selling. Your committee has also had the results of the Federal Trade Commission's several investigations and reports, including its investigation of the chain-store problem. (S. Doc. 4, 74th Cong., 1st Sess.) Other sources of material for study of this legislation include the N.R.A. codes, and N.R.A. code authority hearings; also, studies of independent students and economists.
>
> Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary.

On page 24 of the Final Report of the Federal Trade Commission Report on the Chain-Store Investigation (S. Doc. No. 4, 74th Cong., 1st sess.) the following statement appears:

> "As shown elsewhere, the ability of the chain store to obtain its goods at lower cost than small chains is an outstanding feature of the growth and development of chain-store merchandising. These lower costs have frequently found expression in the form of special discounts, concessions, or collateral privileges which were not available to smaller purchasers. * * *
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> "A vivid idea of the enormous bargaining power embodied in chain-store purchases may be gained from the fact that the Great Atlantic & Pacific Tea Co., makes purchases of merchandise amounting to over $800,000,000 annually and other large chains make purchases in proportionate amounts.
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> "There were interviews with 129 manufacturers in the grocery group, 76 of which admitted that preferential treatment in some form was given. Thirty-three of the manufacturers interviewed stated positively that threats and coercion had been used by chain-store companies to obtain preferential treatment."

The report continues on page 26:

> "There were 88 manufacturers interviewed in the drug group, 36 of which admitted that price preferences are given to chains. * * *

[7] 15 U.S.C. 13, 13a., 13b., 21a.
[8] H. Rept. No. 2287, 74th Cong. 2d sess. (1936).

"Of the 26 tobacco manufacturers interviewed, 16 admitted that price preferences were given by means of extra discounts, rebates, or other allowances. Where threats or coercive measures to force discounts and allowances were employed, some of the manufacturers yielded rather than risk the consequences of their failure to meet the demands of these powerful buying organizations."

The granting of preferences is not confined to any one line of industry or distribution. In entering its cease-and-desist order in the matter of Goodyear Tire & Rubber Co., Docket 2116, recently, the Federal Trade Commission in summarizing its findings of facts stated:

"Pursuant to the terms of these several tire contracts between respondent (Goodyear Tire & Rubber Co.) and Sears, Roebuck & Co., respondent has sold tires to Sears, Roebuck & Co. at prices substantially lower than it sold tires of comparable grade and quality to independent retail tire dealers. This difference in sales price has averaged, on four popular sizes of tire casings, from 32 to 40 percent in 1927; from 33 to 55 percent in 1928; from 35 to 45 percent in 1929; from 36 to 46 percent in 1930; from 35 to 45 percent in 1932; from 35 to 53 percent in 1933. The average gross determination on these four sizes for the entire period of time from May 1926 to December 1931 was approximately 40 percent. On other sizes the gross discrimination over the entire period varied from 32 to 42 percent.

"The net average sales price discrimination remaining after deductions have been made from the dealer prices for discounts and allowances and transportation, over the entire period, varied from 29 to 40 percent on eight sizes of tires. The total aggregate net discrimination, after making such allowances, amounted to approximately $41,000,000, or approximately 26 percent of the net sales price to independent dealers on a volume of business comparable to the volume sold to Sears, Roebuck & Co."

The Commission further found as a fact that such discriminatory prices were not made to Sears, Roebuck & Co. in good faith to meet competition; and also that the Goodyear Tire & Rubber Co. concealed the prices and terms at which it was selling tires to Sears, Roebuck & Co. from its own sales organization and from the trade generally, and at no time did it offer to its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co.

It should also be noted that the Committee on the Judiciary of the Senate in its report [9] on S. 3154 during the 74th Congress stated:

In its consideration of this bill, the committee has had the benefit not only of the diligent studies of its own members, but of the record of hearings on a similar bill (H.R. 8442) before the Committee on the Judiciary of the House of Rep-

[9] S. Rept. No. 1502, 74th Cong. 2d sess. (1936).

resentatives, also of the hearings before a Special Committee of the House on Investigation of the American Retail Federation, and of the report on the Federal Trade Commission on its chain-store investigation (S. Doc. No. 4, 74th Cong., 1st sess.). These have developed so fully the facts, trade and industrial, pertinent to the objects of the bill, together with representations of all interested parties for or against its specific provisions, that this committee has felt able to reach its decision without the delays of further hearings.

The Congress passed the Robinson and Patman bills overwhelmingly. Only 16 votes were recorded in opposition in the House of Representatives and none in the Senate. The enactment was completed on June 16, 1936, and President Roosevelt signed the Robinson-Patman Act [10] on June 19, 1936.

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[10] 49 Stat. 1526; Public Law 692, 74th Cong. (1936).

Chapter V. The Robinson-Patman Act and an Analysis of Its Provisions

A. THE ACT ITSELF

The exact language of the Robinson-Patman Act[1] is as follows:

SEC. 1.[2] * * *

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal

[1] 49 Stat. 1526; 15 U.S.C. 13, 13a, 13b, 21a; Public Law 692, 74th Cong. (1936).
[2] Amended sec. 2 of Clayton Act.

goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review,

based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

B. ANALYSIS OF THE ACT

By enacting the Robinson-Patman Act, Congress intended to "suppress discrimination between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them," [3] and "to restore so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination. . . ." [4] Although discrimination in the form of price concessions to large and powerful buyers was the principal conduct at which the Act was addressed, it prohibits other devices or arrangements by which such buyers could achieve unjustified competitive advantages over their smaller competitors.[5]

Section 2(a), which is the heart of the Act, prohibits sellers from discriminating in price among competing purchasers in contemporaneous sales of commodities of like grade and quality in interstate commerce, where competitive injury is likely to result. The interstate commerce requirement is satisfied when one of the parties to a transaction is engaged in interstate commerce, and where at least one of the two sales transactions is made across a state line.[6] The discrimination may be direct or indirect, ranging from simple price schedules to complicated pricing systems.[7]

To fall under the Act, the same seller must discriminate in at least two completed sales to different purchasers, reasonably close in point of time. This requirement of contemporaneous sales affords the seller flexiblity in altering his prices from time to time as necessitated by his costs and other marketing factors. The Act applies only to sales transactions and not to offers of sale, refusals to deal, or non-sale transactions such as leases or consignments. Moreover, it applies only to sales of tangible commodities and not to transactions involving services or other intangibles.[8]

In order to come within the Act, the commodities involved must be of "like grade and quality," a requirement established to ensure that the challenged transactions are reasonably comparable from a commercial point of view.[9] The Supreme Court has held that grade and quality are to be determined by the "characteristics of the product itself," [10] and while significant physical differences between products will mean

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[3] Report of the Senate Committee on the Judiciary to Amend Antitrust Act, S. Rep. No. 1502, 74th Cong., 2d sess. 3 (1936).

[4] Report of the House Committee on the Judiciary on Prohibition of Price Discriminations, H.R. Rep. No. 2287, 7th Cong., 2d sess. 3 (1936).

[5] *See FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168–69; *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445, 448 (2d Cir. 1964).

[6] *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195–99 (1974).

[7] *FTC* v. *Anheuser-Busch, Inc.* 363 U.S. 536, 549 (1969).

[8] It should also be pointed out that sales to the Federal Government are exempt from the Act's coverage, as are also purchases of supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit. *See* 38 Ops. Atty Gen. 539 (1936); Opinion of the Comptroller General of the United States, 1973–2 Trade Cas. ¶ 74,642 (1973); *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 1974–1 Trade Cas. ¶ 75,054, at p. 16,742 (D. Utah 1974).

[9] *See FTC* v. *Borden Co.*, 383 U.S. 637, 643 (1966).

[10] *Id.* at 641.

the Act does not apply,[11] identical products sold under different brands are potentially subject to the Act to the extent that they are of like grade and quality and discrimination occurs.[12] However, the existence of a consumer preference for a well-known brand may negate competitive injury, where the price difference reflects the greater consumer acceptance enjoyed by the premium brand.[13]

The final jurisdictional requirement under Section 2(a) of the Robinson-Patman Act—the likelihood of competitive injury—emphasizes that only those discriminations likely to have a substantial adverse effect upon competition are prohibited. This requirement reconciles the Act with the Congressional antitrust policy embodied in the Sherman Act and other antitrust statutes.[14] Moreover, the Act is designed to reach such practices in their incipiency, upon a showing that detrimental effects are probable, before the harm to competition has resulted.[15] Specifically, price discriminations are proscribed which may substantially (1) lessen competition; (2) tend to create a monopoly in any line of commerce; or (3) injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. The first two tests of the illegality, which were contained in the original Section 2 of the Clayton Act as passed in 1914, involve adverse competitive impact upon the total relevant market, while the third standard, which was added by the Robinson-Patman amendments in 1936, focuses upon the probable adverse impact in competitive relationships.

Unlawful competitive injury may result at the seller level, known as the primary level of competition, where the price discrimination by a seller among his customers may cause the seller's competitors to lose sales. Competitive injury may also occur at the buyer level, known as the secondary level of competition, where a disfavored purchaser suffers injury in his ability to compete with his competitors who receive a preferential price from the same supplier.[16] In addition, competitive injury may occur at the third [16a] or fourth [16b] levels of distribution, where customers further down the distributional chain are adversely affected by discriminations between customers of the same supplier higher in the chain. Of course, regardless of the level of distribution at which the competitive injury occurs, that injury must be causally related to the price discrimination.[17]

It is important to note that the Act does not prohibit a seller from establishing different prices at different distributional levels (for example, between wholesalers and retailers), in order to compensate buyers who perform distribution functions. This recognizes that competitive injury will not generally occur where price differentials in the form of functional discounts are made between purchasers who do not regularly compete.[18] Likewise, a seller may establish different

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[11] *See e.g., Universal-Rundle Corp.*, 65 F.T.C. 924 (1964), *order set aside*, 352 F. 2d 831 (7th Cir. 1965), *rev'd and remanded*, 387 U.S. 244 (1967) ; 66 F.T.C. 1131 (1964).
[12] *FTC* v. *Borden Co.*, 383 U.S. 637, 645–46 (1966).
[13] *Borden Co.* v. *FTC*, 381 F. 2d 175, 181 (5th Cir. 1967). *See also FTC* v. *Borden Co.*, 383 U.S. 637, 646 (1966).
[14] *See Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 74 (1953).
[15] *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945).
[16] *See, e.g., FTC* v. *Morton Salt Co.*, 334 U.S. 37, 43 (1948).
[16a] *See Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).
[16b] *See Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969).
[17] *Id* at 648.
[18] *See, e.g.*, Hruby Distributing Co., 61 F.T.C. 1437, 1446–47 (1962).

price schedules for purchasers in different geographical trading areas who do not generally compete with one another.[19]

Section 2(a) of the Act also contains specific defenses which may be interposed against a claim of price discrimination. Thus, price differentials which are cost justified, that is, which make only due allowance for the differences in the cost of manufacturer, sale or delivery resulting from differing methods or quantities in which commodities are sold or delivered, are not unlawful. This defense recognizes the economic desirability of permitting a seller to reduce his price to any buyer who can demonstrate cost savings which flow from dealing with that customer.[20] Further, price changes which are made in response to changing conditions affecting the market for (or the marketability of) the goods concerned are expressly permitted, as in the case of sales made to avoid deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales made in a good faith discontinuance of business. In addition, while not specifically enumerated in Section 2(a) of the Act, the Commission and the courts have recognized that the "availability" of a preferred price to all competing customers may be a defense to a charge of price discrimination on the ground that no competitive injury can flow from sales at different prices where the preferred price is realistically available to all competing customers.[21]

Section 2(b) of the Act provides a complete defense to a charge of price discrimination under Section 2(a) where a seller has lowered his price in a good faith effort to meet an equally low price of a competitor. This defense expressly recognizes the need for a seller to adjust his pricing practices to particular competitive situations and permits him flexibility to compete.[22] The applicability of the meeting competition defense need not be rigidly restricted to situations in which a seller responds to retain his existing customers. An increasing number of courts have recognized that the defense is valid where a seller offers to meet a competing price in order to gain new customers.[23]

Section 2(c) of the Act, the so-called "brokerage provision," is an independent section which prohibits sellers from paying brokerage, or discounts in lieu of brokerage, directly or indirectly, to buyers or to their agents, as well as the making of such payments by either party to the agent of the other, except for services rendered in connection with the sale or purchase of goods. This section is aimed at dummy brokerage payments which actually constitute secret or disguised price concessions eventually falling into the hands of the buyer.[24] Conduct violative of this section is *per se* unlawful without the need to show

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[19] *See FTC* v. *Sun Oil Co.*, 371 U.S. 505, 526–28, and n. 16 (1963).

[20] Report of the Senate Committee on the Judiciary to Amend Antitrust Act, S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936) Report of the House Committee on the Judiciary on Prohibition of Price Discriminations, H.R. Rep. No. 2287, 7th Cong., 2d Sess. 3 (1936).

[21] *See e.g., Tri-Valley Packing Ass'n* v. *FTC*, 329 F. 2d 694, 703–04 (9th Cir. 1964), on *remand*, 70 F.T.C. 223 (1966), modified and aff'd sub nom., *Tri-Valley Growers* v. *FTC*, 491 F. 2d 985 (9th Cir.), *cert. denied*, 396 U.S. 929 (1969).

[22] *See, e.g., Cadigan* v. *Texaco, Inc.*, 492 F. 2d 383, 387 (9th Cir. 1974).

[23] *See, e.g., Sunshine Biscuits, Inc.* v. *FTC*, 306 F. 2d 48, 51–52 (7th Cir. 1962) ; *Jones* v. *Borden Co.*, 430 F. 2d 568, 572–74 (5th Cir. 1970) ; *Hanson* v. *Pittsburgh Plate Glass Industries, Inc.*, 482 F. 2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) ; *Cadigan* v. *Texaco, Inc.*, 492 F. 2d 383, 387 (9th Cir. 1974). *McCaskill* v. *Texaco, Inc.*, 351 F. Supp. 1332, 1340 (D. Ala. 1972), *aff'd w/o published opinion sub nom. Harrelson* v. *Texaco, Inc.*, 386 F. 2d 1400 (5th Cir. 1973).

[24] Report of the Senate Committee on the Judiciary to Amend Antitrust Act, S. Rept. No. 1502, 74th Cong., 2d Sess. 3 (1936). Report of the House Committee on the Judiciary on Prohibition of Price Discrimination, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

competitive injury, and the defenses of cost justification and meeting competition are likewise inapplicable.[25] However, the "except for services rendered" proviso reflects the ability of sellers to provide discounts contemporaneously with a reduction of brokerage costs, if those discounts can be related to cost or other savings other than brokerage, where the buyer performs legitimate services for the seller.[26]

Sections 2(d) and 2(e) of the Act are related provisions which prohibit a seller from granting promotional allowances, services or facilities to a customer in connection with the resale of his products unless such promotional assistance is made available to all competing customers on proportionally equal terms. Section 2(d) is applicable when a supplier makes payments for promotional services performed by his customers, while Section 2(e) applies when the supplier himself provides promotional services to his customers. These sections attempt to reach special arrangements whereby a supplier provides preferential promotional payments, services or facilities to favored customers, such as for advertising and display, in order to facilitate the resale of the supplier's goods.[27] There is no single way by which the supplier may proportionalize the promotional services or allowances, so long as such payments or services are made functionally available on a basis that is fair to all competing customers.[28] Where promotional payments are not used by customers for the purposes for which they were allowed, or where they greatly exceed the cost (or value) of the services performed, they may be challenged as an indirect price concession under Section 2(a) of the Act.[29]

As with Section 2(c), a violation of Sections 2(d) or 2(e) need not be accompanied by a showing of competitive injury. Nor is the defense of cost justification applicable to these sections.[30] However, the defense of meeting competition is available.[31]

Section 2(f) of the Robinson-Patman Act, the so-called "buyer inducement" provision, prohibits a buyer from inducing or receiving discriminatory prices which he knows violate Section 2(a) of the Act. This section was aimed at curbing the power which had been utilized by chains and other large buyers to pressure suppliers into granting them unjustified price concessions,[32] and was also viewed as providing support to suppliers, including large corporations, resisting such demands.[33]

It should be emphasized that Section 2(f) does not impose a standard of absolute liability on buyers, but merely prohibits them knowingly inducing or receiving discriminatory prices where competitive

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[25] *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65–67 (1959).

[26] *See, e.g., FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 175–76 (1960); *Thomasville Chair Co.* v. *FTC*, 306 F. 2d 541, 545 (5th Cir. 1962); *Central Retailer-Owned Growers, Inc.* v. *FTC*, 319 F. 2d 410, 414–16 (7th Cir. 1963); *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 364 F. 2d 491, 492 (2d Cir. 1966) (*en banc*), *cert. denied*, 385 U.S. 1002 (1967).

[27] Report of the Senate Committee on the Judiciary to Amend Antitrust Act, S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). Report of the House Committee on the Judiciary on Prohibition of Price Discrimination, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

[28] *See* Lever Bros. Co., 50 F.T.C. 494, 512 (1953); FTC, "Guides for Advertising Allowances and Other Merchandising Payments and Services," 16 C.F.R. § 240 7 (1973).

[29] *See R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445, 449 (2d Cir. 1964); Footnote 2 of Example 1, FTC, "Guides for Advertising Allowances and Other Merchandising Payments and Services," 16 C.F.R. § 240 9 (1973); *cf. American News Co.* v. *FTC*, 300 F. 2d 104, 109 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

[30] *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 64–65 (1959).

[31] *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F. 2d 499, 505 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

[32] *See Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 79 (1953).

[33] *See* 80 *Cong. Rec.* 9419 (1936) (remarks of Rep. Utterback).

injury is likely to occur. In order to find a violation of the Act, it is not sufficient to show that a buyer knew that he received a preferential price, but it must also be established that the buyer knew or should have known that the price he received was not a lawful one which could be successfully defended or justified by the seller.[34] Accordingly, violations of Section 2(f) will generally be found only where there has been a corresponding violation of Section 2(a) by the seller, and the defenses available to a seller may also be used by the buyer in an action brought under Section 2(f). There are, however, recent cases where a buyer has given false information to the supplier and been found to have violated Section 2(f), notwithstanding the fact that the seller did not violate Section 2(a).[35]

While Section 2(f) of the Act is limited to inducement or receipt of discriminatory prices, the Trade Commission has successfully employed Section 5 of the Federal Trade Commission Act to reach the knowing inducement or receipt of discriminatory promotional allowances, services or facilities as an unfair method of competition.[36]

The various subsections of Section 2 of the Robinson-Patman Act are civil provisions susceptible only of injunctive and monetary relief. On the other hand, Section 3 of the Act [37] is a criminal statute, violation of which is punishable by a fine of up to $5,000, or imprisonment of up to one year, or both. This section is aimed at three specific practices, namely: (1) general price discrimination; (2) geographic price discrimination; and (3) sales at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. The purpose of this section was to impose criminal liability upon particularly harmful discriminatory practices predatorily committed for the specific purpose of destroying competition.[38] The statutory defenses available under Section 2(a) are also applicable to criminal actions brought under Section 3. However, as a criminal provision, this section may only be invoked by the government and does not provide the basis for a private treble damage action.[39]

Lastly, Section 4 of the Robinson-Patman Act [40] expressly permits cooperatives to return to their members on a proportionate basis any net savings effected through their operations. This provision was included to protect small business cooperative organizations and to expressly recognize their ability to pass on savings to their members without violating the other provisions of the Act.[41] This exemption is limited to the function of passing along savings to the members of cooperatives, and does not grant any special exemptions from the law for such groups with respect to the manner in which they may earn such savings.[42]

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[34] *See Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 70–71 (1953).

[35] *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert denied*, 404 U.S. 871 (1971); The Great Atlantic & Pacific Tea Co., 3 CCH Trade Reg. Rep. ¶ 21,015 (FTC Initial Decision Sept. 24, 1975).

[36] *See, e.g., R. H. Macy & Co.* v. *FTC*, 326 F.2d 445, 447–48 (2d Cir. 1964); *Giant Food, Inc.* v. *FTC*, 307 F.2d 184, 185–86 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

[37] 15 U.S.C. § 13a (1970).

[38] *See United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 33–36 (1963); H.R. Rep. No. 2951, 74th Cong., 2d Sess. 3 (1936), Report of the House Conference Committee on the Prohibition of Price Discriminations (hereinafter cited as *Conference Report*).

[39] *Nashville Milk Co.* v. *Carnation Co.* 355 U.S. 373, 375–76 (1958).

[40] U.S.C. § 13b (1970).

[41] *Conference Report* at 8. Report of the House Committee on the Judiciary on Prohibition of Price Discriminations, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

[42] *See, e.g.*, Mid-South Distributors v. FTC, 287 F.2d 512, 516 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); Kentucky Rural Electric Coop. Corp. v. Maloney Electric Co., 282 F.3d 481, 485 (6th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961).

C. FTC CHAIRMAN DIXON'S OBSERVATIONS

The Honorable Paul Rand Dixon, when he was the Chairman of the Federal Trade Commission made an interesting observation. In a speech [43] on the Robinson-Patman Act, he said:

> Unless one is looking for a place to hide, it is not now difficult to know what the Robinson-Patman Act says and means. Today the difficulty with those who say they have trouble with the statute is not, it seems to me, that they do not know what it means, but rather that they do not want it to mean what it says.

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[43] Address before the National Food Brokers Ass'n., New York, N.Y., December 3, 1966.

Chapter VI. Clarification and Enforcement of the Robinson-Patman Act

A. Interpretation of the Antitrust Laws in General

Antitrust is by far the most comprehensive and complex item of economic policy,[1] and it has been subjected to many years of interpretation and adjudication.

The basic premise or principle of the Antitrust Laws has been expressed by the Supreme Court [2] in these words: "... the purpose was ... to make of ours, so far as Congress could under our dual system, a competitive business economy."

In connection with the interpretation of the Antitrust Laws, it should be noted that the courts have been given by Congress wide powers in monopoly regulation. The very broadness of terms such as "restraint of trade," "substantial competition," and "purpose to monopolize" have placed upon the courts the responsibility to seek to eliminate the evils at which the Congress aimed.[3] Because these laws are necessarily couched in broad terms, they are adaptable to the changing types of production and of distribution and were enacted under the conviction that a competitive economy would best promote a democratic society. Ethical standards for the conduct of business are also involved. Despite these generalities in the laws, the Federal Trade Commission and the courts have clarified their meaning.

B. Discussion of Findings of Fact and Interpretation of Law in Leading Cases Decided by the Federal Trade Commission and the Courts

The enforcement of the Robinson-Patman Act by the Federal Trade Commission and also by small business enterprises utilizing private litigation brought some measure of relief from destructive and injurious price discrimination practices. Also, concomitant with the FTC's enforcement efforts and actions brought by private parties, the resulting opinions by the Commission and the courts brought with it considerable clarification, development and interpretation of the real meaning and thrust of the Robinson-Patman Act as can be gathered from the following leading cases. One of those was the *Goodyear Tire & Rubber Case* [4] which arose at the FTC prior to the passage of the Robinson-Patman Act.

(1) *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*

I. Facts

Sears, Roebuck & Co. entered into a long term contract with the Goodyear Tire & Rubber Co. Under the contract, Sears, which was by

[1] See "Congress and the Monopoly Problem" (1966), Small Business Committee Print.
[2] *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 559 (1944).
[3] *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 526 (1948).
[4] *Goodyear Tire & Rubber Co.* v. *FTC*, 101 F. 2d 620 (6th Cir. 1930), cert. denied, 308 U.S. 557 (1939).

far the tire company's largest customer, agreed to purchase tires on a cost plus basis. The resulting price was below the price paid to the tire company by competitors of Sears for tires of like grade and quality, and the price differential was somewhat greater than the actual savings to the tire company.

The Federal Trade Commission instituted proceedings against the tire company alleging a violation of section 2 of the Clayton Act. This action was directed solely at conduct antedating the Robinson-Patman Act in 1936.

II. DEVELOPMENT OF THE LITIGATION

After hearings, the Commission held that the Clayton Act's quantity discount proviso did not warrant discrimination in price beyond the actual cost savings to the seller.

On appeal the Sixth Circuit reversed the Commission's legal conclusion and held that under the Clayton Act prior to 1936 quantity discounts were not limited to any resulting cost savings. In support of its conclusion, the court referred to pre-1936 Congressional comments which indicated that the Robinson-Patman Act constituted a substantive change in the law.

The second case was that of the *Great Atlantic and Pacific Tea Co.* v. *FTC* [5] which was decided by the third circuit in 1939. This was after the passage of the Robinson-Patman Act.

(2) *Great Alantic & Pacific Tea Co.* v. *Federal Trade Commission*

I. FACTS

Prior to the enactment of the Robinson-Patman Act in 1936, the A & P Co. purchased directly from suppliers rather than through intermediary brokers but received brokerage payments from the suppliers. Shortly after passage of the Act, the company instructed its buying agents to purchase commodities at a net price reflecting the amount of brokerage previously paid to A & P; to receive "quantity discounts" equal to the previous brokerage; or to seek to have sellers escrow the brokerage pending a determination of the legality of such payments.

The Federal Trade Commission challenged this practice on the ground that the Company was receiving discounts or allowances in lieu of brokerage, in violation of Section 2(c).

II. THE LITIGATION

The respondent asserted that it had accepted no discounts or allowances in lieu of brokerage; that even if it did accept such discounts, it had rendered services therefor within the meaning of Section 2(c); and that Section 2(c) was qualified by the cost justification proviso of Section 2(a).

These contentions were rejected by the Commission and the Third Circuit Court of Appeals. The Commission referred to a Congressional Report which commented that "[a]mong the prevalent modes of discrimination at which this bill is directed is the practice of certain large

[5] *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667 (3rd Cir. 1939), cert denied, 308 U.S. 625 (1940).

buyers to demand the allowance of brokerage direct to them upon their purchases" or to an agent whom they set up in the guise of a broker. (H. Rep. 2287, 74th Cong., 2nd Sess. 14–15 (1936)). In view of such pronouncements, the Commission found that Section 2(c) was intended by Congress to prohibit without qualification the payment of brokerage by a seller to a buyer, or the granting of any allowance or discount in lieu thereof. The Third Circuit, affirming, held that Section 2(c) contains an absolute prohibition of payments or allowances of brokerage or sums in lieu thereof from sellers to buyers. It reasoned that Sections 2 (a) and (c) of the Robinson-Patman Act are independent of one another, and that the cost justification defense of section 2(a) was inopposite to proceedings under Section 2(c).

III. IMPORTANCE OF THE CASE

This was the first case under Section 2(c) of the Robinson-Patman Act, and demonstrates the type of devices which would be used to receive discriminatory prices were Section 2(c) to be repealed, or were brokerage payments ignored in determining the existence of price discrimination.

The third case of importance was that of *Federal Trade Commission* v. *Morton Salt Co.*[6] That involved the matter of the Morton Salt Company having granted a quantity discount which was available only to about four or five purchasers in the United States to the exclusion of all others. This was on a volume of 50,000 cases of salt per year or more. The synopsis of that case is as follows:

(3) *Federal Trade Commission* v. *Morton Salt Co.*

I. FACTS

Morton Salt Co. sold salt to wholesalers for resale to the retail trade and also sold directly to large retailers. All of its salt was sold pursuant to quantity discount plans. The maximum discount under one plan was granted to customers who prchased 50,000 cases in any consecutive twelve month period. Only five companies (large chain stores) ever bought sufficient quantities of salt to qualify for this maximum discount. In addition to these standard quantity discounts, special allowances were granted to certain favored customers.

The Federal Trade Commission charged Morton Salt with price discrimination in violation of Section 2(a) of the Robinson-Patman Act.

II. THE JUDICIAL BACKGROUND

The Commission found that Morton Salt's discount plans violated Section 2(a). On appeal, the Seventh Circuit set aside the Commission's findings, reasoning that the Commission failed to prove that a difference in price, based on the quantity sold and conforming with "reasonable, customary, and accepted" economic differences adversely affected competition.

The Supreme Court reversed the court of appeals and reinstated the Commission's findings and order. The Court reasoned that standard quantity discounts, although theoretically available to all, could be

[6] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), rev'g. 162 F. 2d 949 (7th Cir. 1947).

discriminatory within the meaning of the Robinson-Patman Act if the discounts were functionally unavailable to all competitors unless the discounts were cost justified or given to meet competition. It explained that one goal of the 1936 Act was to deprive large buyers of their competitive advantage over small buyers which existed solely because of the large buyer's quantity purchasing ability. The Court also held that the discrimination in price need not have actually harmed competition to be unlawful if there existed a "reasonable possibility" that the discriminations "might" have such effect, although it concluded that the Commission in this case had in fact established actual injury to competition. Finally, the Court deemed immaterial for several reasons the fact that salt constituted a small item in businesses and in consumer budgets. Because a grocery store consists of many comparatively small items, there is no way to effectively protect a grocer except by applying the prohibitions of the Act to each individual item in the store.

(4) *Federal Trade Commission* v. *Cement Institute*

III. IMPORTANCE OF THE CASE

This case has a number of significant features. It was the first Supreme Court case to articulate the functional availability of discount plans as a test of price discrimination. It also established that the Act is an incipiency statute in that the controlling standard for proof of injury to competition is a reasonable possibility that price discrimination might cause competitive injury. Moreover, this decision emphasized the Congressional desire to protect the small businessman that formed the basis for the Act's enactment, a desire which should not be minimized today.

The next case of importance is *Federal Trade Commission* v. *Cement Institute*,[7] the synopsis of which is set forth below:

I. FACTS

The Federal Trade Commission brought an action against the Cement Institute, a trade association composed of 74 corporations engaged in the manufacture, sale and distribution of cement; and its corporate members. The association's members employed a multiple basing point system of pricing. According to the Commission, this pricing system resulted in price discriminations among the customers of each respondent, and was being used by the respondents to eliminate price competition among themselves. Thus, the respondents were charged with violating the Robinson-Patman Act and Section 5 of the FTC Act.

II. THE JUDICIAL BACKGROUND

After a three year hearing, the Commission found the respondents to be in violation of Section 2(a) of the Robinson-Patman Act because of their concerted use of the multiple basing point pricing system. It also found them to be in violation of Section 5 of the FTC Act on the theory that industry-wide usage of the challenged pricing system constituted a combination or conspiracy in restraint of trade.

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[7] *FTC* v. *Cement Institute*, 333 U.S. 683 (1948), rev'g. 157 F.2d 533 (7th Cir. 1946).

The Seventh Circuit reversed the Commission's decision, holding that the evidence failed to support the Commission's conspiracy finding.

On appeal, the Supreme Court reversed the court of appeals, and adopted the Commission's factual and legal conclusions.

The Court brushed aside the respondents' assertion that the use of the multiple basing point delivered pricing system was not price discrimination within the meaning of Section 2(a), indicating that its prior decisions on this subject were consistent in this regard. The only issue the Court deemed unsettled was whether the respondent's multiple basing point system was lawful under the meeting competition proviso of Section 2(b). The Court explained that the meeting competition defense placed emphasis on individual competitive situations, rather than upon a general system of competition wherein a seller consistently receives more money for like goods from some customers than he does from others. The Court distinguished the respondents' concurrent use of this pricing system, which deviated from the sanctioned competitive response to an individual stimulus. Collusive industry-wide pricing practices, it held, were hardly good faith efforts to meet competition.

III. IMPORTANCE OF THE CASE

A very significant aspect of *Cement Institute* is its discussion of the meeting competition defense. It should also be noted that the case does not prevent an individual supplier from using multiple basing points in the course of distributing his product, but merely restricts industry wide agreements in this regard. Further, the acceptaance of the Commission's use of Section 5 in a price discrimination context is also significant.

Another significant case is that of the *Federal Trade Commission* v. *National Lead Co.:* [8]

(5) *Federal Trade Commission* v. *National Lead Co.*

I. FACTS

The FTC brought proceedings against a number of corporations that manufactured, sold and distributed lead pigment. These corporations, it was alleged, adopted, pursuant to agreement, highly artificial uniform zone pricing systems and quantity differentials covering lead pigments in violation of section 2(a) of the Robinson-Patman Act. The corporations were also charged with conspiring to fix and control the prices of lead pigment in violation of section 5 of the FTC Act.

II. THE JUDICIAL BACKGROUND

In addition to a finding of price fixing, the Commission found that the zone and quantity differentials constituted price discrimination in violation of section 2(a) of the Robinson-Patman Act, with one exception which was deemed to be cost-justified. The Seventh Circuit affirmed the Commission's factual and legal findings in most respects. However, the court set aside the Commission's cease and desist order

[8] *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957), rev'g. 227 F. 2d 825 (7th Cir. 1955).

insofar as it precluded individual defendants from employing a zone pricing system.

The sole question presented to the Supreme Court related to the power of the Commission to frame an order limiting individual action in view of the findings that respondents had conspired to adopt and use a zone delivered pricing system in their sale of lead pigments, and in view of the Commission's disclaimer that it was not challenging individual uses of the zone system. The Court held that the order was appropriate, noting that an individual delivered zone pricing system violated the Commission's order only when identical prices with competitors resulted from the pricing system, and the system was not established in good faith to meet the price offered by a competitor.

III. IMPORTANCE OF THE CASE

Insofar as the Robinson-Patman Act is concerned, *National Lead* is important for its recognition that zone pricing systems are not *per se* illegal, but that question may arise under both the Robinson-Patman Act and the Federal Trade Commission Act when competitors' zone pricing systems are identical.

The case of *Forster Manufacturing Co.* v. *Federal Trade Commission* [9] is one of those cases that dealt with primary line injury, which is rather rare under the Robinson-Patman Act. This case clearly demonstrates that the Robinson-Patman Act is an important antitrust statute and can play a significant role in protecting small and local businesses from the predatory practices of their large, national competitors. That case may be summarized thus:

(6) *Forster Manufacturing Co.* v. *Federal Trade Commission*

I. FACTS

Forster Mfg. Co., a major producer of "woodware products," such as meat skewers, toothpicks, and clothespins, gave a 5% discount to three large customers, and in addition engaged in predatory price cutting, resulting in driving a major competitor out of business. At about the same time, a small company, attempting to break into the Forster-dominated Pittsburgh clothespin market, offered a free case of clothespins with each purchase of 10 cases. Three companies accepted this offer. Forster responded to this "threat" with an area-wide matching offer, which quickly put an end to the competition.

The FTC charged Forster with violating section 2(a) of the Robinson-Patman Act.

II. THE PROCEDURES

The Commission found that the 5% discounts granted by Forster to its skewer customers were discriminatory, and not shown to be cost justified. In reaching this determination, the respondents' predatory conduct, although not in itself deemed unlawful, was considered relevant to the question of whether the price discriminations had substantially injured competition.

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[9] *Forster Mfg. Co.* v. *FTC*, 335 F. 2d 47 (1st Cir. 1964), cert denied, 380 U.S. 906 (1965) order affirmed 361 F. 2d 340 (1st Cir. 1966).

The Commission also concluded that Forster's area-wide clothespin bonus case program constituted primary and secondary line price discrimination in violation of section 2(a) of the statute, because persons not within the favored area were in competition with persons receiving the bonus.

On appeal, the First Circuit agreed that a prima facie case of unlawful price discrimination had been established. However, the court remanded the case to the Commission for further consideration of the respondents' good faith meeting competition defense. According to the court, the proper standard articulated in *Staley*, was whether the respondents were aware of facts which would lead a "reasonable and prudent person" to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

The Commission subsequently reconsidered the company's actions in light of this standard, but again concluded that Section 2(b) was inappropriate to the facts at hand. This conclusion was affirmed on appeal.

III. IMPORTANCE OF THE CASE

Forster demonstrates that the Robinson-Patman Act is an important antitrust statute and can play a significant role in protecting small local businesses from the predatory practices of their large national competitors.

The United States Supreme Court in 1953, decided *Automatic Canteen Co.* v. *Federal Trade Commission*[10] which has, perhaps, become the controlling case under section 2(f) of the Robinson-Patman Act. That case is as follows:

(7) *Automatic Canteen Co.* v. *Federal Trade Commission*

I. FACTS

The Automatic Canteen Co. was a large buyer of candy and other confectionery products for resale through vending machines. It negotiated for and received from its suppliers prices that it allegedly knew were as much as 33% lower than prices quoted its competitors.

The Federal Trade Commission instituted proceedings against the company under Section 2(f) of the Robinson-Patman Act.

II. THE JUDICIAL BACKGROUND

The Commission found a violation of the Act since the company knew it was paying less than list price, and the Commission was not required to show that the price differentials were not cost justified. This decision was affirmed by the Seventh Circuit which held that the Commission's prima facie case under Section 2(f) does not require showing the absence of a cost justification.

The Supreme Court reversed, holding that Section 2(f) makes unlawful the *knowing* inducement of discriminatory prices, and that mere knowledge that a purchase price was than the current market price was not sufficient to establish a violation. The Commission is

[10] *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953), rev'g 194 F. 2d 433 (7th Cir. 1952).

not required to adduce evidence that the buyer has mathematically specific knowldege that the seller's conduct constitutes unlawful price discrimination. Proof of the buyer's trade experience may be sufficient to provide a basis for an inference of the requisite knowledge. For example, the Court indicated that proof that a buyer who knowingly received a lower price than his competitors also knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor, would establish a prima facie violation.

III. IMPORTANCE OF THE CASE

This was the first Supreme Court decision construing Section 2(f) of the Robinson-Patman Act, and establishes that a buyer violates the statute only if he knows he is receiving an unlawful price discrimination. *Automatic Canteen* has been further refined in the following cases:

Kroger Co. v. *FTC*, 438 F. 2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971): Even if a seller asks in good faith to meet competitor's lower prices and thus does not violate section 2(a), the inducing buyer may still be held to violate section 2(f) if it knows that there is no comparable competitive offer to be met, but nevertheless induces the seller to meet the nonexistent competition by active misrepresentations made the seller

The Great Atlantic & Pacific Tea Co., 3 Trade Reg. Rep. ¶ 21.015 (FTC Initial Decision, Sept. 24, 1975): An Administrative Law Judge has held that a buyer violates Section 5 of the Federal Trade Commission Act when a supplier expressly offers a low price based on the mistaken belief that a competitor has offered an equally low price, and the buyer remains silent despite knowing there is no such competitive offer.

Colonial Stores v. *FTC*, 450 F. 2d 733 (5th Cir. 1971): A buyer who induces discriminatory promotional allowances violates Section 5 of the Federal Trade Commission Act, if he knows that the granting of such promotional allowances by the seller violates Section 2(d) of the Robinson-Patman Act.

Alterman Foods, Inc. v. *FTC*, 497 F. 2d 993 (5th Cir. 1974): Alterman, by knowingly inducing and receiving discriminatory allowances and services relative to trade shows, was found to have violated Section 5 of the FTC Act. This case follows the holding of the *Colonial Stores*.

The Robinson-Patman Act, section 2(d) and section 2(e) were involved in the *Elizabeth Arden Case*:[11]

(8) *Elizabeth Arden, Inc.* v. *Federal Trade Commission*

I. FACTS

The respondents sold a "prestige" line of cosmetics to selected retailers. Retail sales persons known as "demonstrators" were furnished without cost by the cosmetic company to a group of customers, which, although comprising approximately 10% of respondent's total

[11] *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (2d Cir. 1946) cert. denied, 331 U.S. 806 (1947).

number of customers, accounted for approximately 40% of the company's cosmetics sales. Where demonstrators were furnished, sales increased, sometimes as much as tripled, without an increase in expense to the retailer.

The company purported to offer the demonstrators' services to all customers. However, the conditions that the customers were required to meet in order to obtain the demonstrators meant that 90% of the customers (many of whom competed with the favored group) could not realistically qualify for demonstrator services. For example, the retailers were required to mention the cosmetic's name in fashion shows, advertise several times a month and furnish window displays.

The Commission charged that the respondents had violated section 2(c) of the Robinson-Patman Act by not providing this service on a proportionally equal basis to all of the cosmetics customers.

II. THE JUDICIAL DEVELOPMENTS

The Commission concluded that the respondents were in violation of Section 2(e). It reasoned that Section 2(e) requires any seller who furnishes a service or facility to any purchaser to proportionalize the service or facility, so as not to exclude competitors. Since the respondents had articulated conditions that were intended to exclude the vast majority of customers, the Act had been violated.

The Second Circuit, in a brief opinion, upheld the Commission analysis.

III. IMPORTANCE OF THE CASE

Elizabeth Arden represents a classic example of why Section 2 (d) and (e) should be retained, in that the promotional services furnished had a demonstrably significant effect upon sales, and thus competition.

The case of *Corn Products Co.* v. *Federal Trade Commission* [12] and *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*,[13] reflect that specific facts are of particular importance. The cases also stand for the proposition that the meeting competition defense cannot be used to justify any otherwise illegal pricing system if the respondent has failed to ascertain essential facts which a reasonable person should have discovered.

The following is a summary of the *Corn Products Case:* [14]

(9) *Corn Products Refining Co.* v. *Federal Trade Commission*

I. FACTS

Respondents, a parent corporation and its subsidiary, employed a basing point system of pricing their sales of glucose, with their Chicago factory as the base point, although they also made deliveries from their Kansas City factory. In addition, certain favored customers were granted the right, subsequent to glucose price increases, to place orders at the old price, and were granted certain advertising allowances.

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[12] *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945), *aff'g* 144 F. 2d 211 (7th Cir. 1944).

[13] *FTC* v. *E. Staley Mfg. Co.*, 424 U.S. 746 (1945), *rev'g* 144 F. 2d 221 (7th Cir. 1944).

[14] *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945), *aff'g* 144 F. 2d 211 (7th Cir. 1944).

In view of this conduct, the Commission charged the respondents with violating Sections 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

II. THE JUDICIAL BACKGROUND

After hearings, at which much of the evidence was stipulated, the Commission concluded that the Corn Products Co. and its subsidiary had violated the statute and issued a cease and desist order. The Seventh Circuit sustained the order.

On appeal, the Supreme Court affirmed the lower court decisions.

III. THE SUPREME COURT OPINIONS

The Supreme Court easily concluded that this single basing point price system by a non-basing point seller, whereby the seller's net price varied from sale to sale, violated Section 2(a).

The Court rejected the company's argument that the discrimination in the *terms of sale* differed from price discrimination and were not encompassed by the Act. Simply, the Court reasoned that such discrimination operated to permit favored customers to purchase at lower prices, and was thus an unlawful indirect discrimination in price.

Finally, the Court agreed with the Commission that a Section 2(e) violation occurred any time a commodity is to be resold, whether in its original form or as a processed product. The glucose customer was thus deemed a "purchaser" within the meaning of Section 2(e) even though the glucose was converted into candy by the favored customer.

IV. IMPORTANCE OF THE CASE

This case, along with *Staley*, demonstrates the importance attached by the Commission and the courts to the specific factual circumstances in each case. While basing point pricing systems are not *per se* illegal, if used to effect a price discrimination, illegality may ensue. The cases further are good examples of the point that the Robinson-Patman Act is designed to reach in their incipiency practices which may otherwise blossom into violations of other antitrust laws.

The *A. E. Staley Manufacturing Company* Case [15] is digested thus:

(10) *Federal Trade Commission* v. *A. E. Staley Mfg. Company*

I. FACTS

The Staley Company sold glucose from its Decatur, Ill, plant, under a single basing point delivered price system, Chicago being the basing point. In addition, it made various concessions to preferred customers which effectively constituted price discrimination against its other customers. The Company sought to justify these discriminations by explaining that it was a late entrant into the field and had adopted the same delivered price system as used by its established competitors in order to effectively compete with them.

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[15] *FTC* v. *A. E. Staley Mfg. Co.*, 424 U.S. 746 (1945), *rev'g* 144 F. 2d 221 (7th Cir. 1944).

The Commission charged the company with price discrimination in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

II. THE JUDICIAL BACKGROUND

The Commission held that the price discrimination constituted a prima facie violation of Section 2(a). Moreover, it reasoned that respondents had failed to justify these discriminations by showing they were in fact made in "good faith" to meet a competitor's equally low price.

In agreeing with the Commission (and reversing the Seventh Circuit Court of Appeals) the Supreme Court first noted that in view of its decision in the *Corn Products* case (decided on the same day as *Staley*), price discriminations were necessarily involved where a price basing point is distant from the point of production since delivery costs obviously differ. Thus, the only possible challenge to the FTC opinion was whether the company had shown the discrimination to be in "good faith" to meet a competitor's lower price within the meaning of Section 2(b) of the Act.

As to meeting competition, the Court affirmed the Commission's conclusion that the company had not shown good faith within the meaning of the statute. In particular, the Court first construed the good faith proviso such that a seller does not act in good faith when it adopts a competitor's clearly discriminatory pricing system, where the seller has never attempted to set up a non-discriminatory system.

The Court then emphasized that it was the Commission's responsibility to determine whether a respondent had acted in good faith to meet a competitor's equally low price, and that the statute placed the burden of proving such good faith upon the respondent. In view of the absence of evidence in the record that the respondent had acted to verify the reports upon which it based its price discrimination, or had sought to learn the existence of facts which would lead a reasonable and prudent person to believe the lower price was necessary to meet a competitor's lower offer, the Commission's findings and conclusions were affirmed.

III. IMPORTANCE OF THE CASE

As did *Corn Products*, the Court's decision in *Staley* teaches us that the specific facts of the case are of particular importance. The case also stands for the proposition that the meeting competition defense cannot be used to justify an otherwise illegal pricing system if the respondent has failed to ascertain essential facts which a reasonable person should have discovered.

C. AN APPRAISAL OF THE ROBINSON-PATMAN ACT EFFECTIVENESS BY ONE OF THAT ACT'S SEVEREST CRITICS

After the Robinson-Patman Act was passed in 1936 to protect trade and commerce against unlawful price discrimination and predatory trade practices, a voluminous literature has developed on the legal and economic issues arising out of the enforcement of this vital and important law.

Perhaps one of the severest critics of the Robinson-Patman Act is Professor Corwin D. Edwards of the University of Chicago. Hence,

his views as to the effectiveness of this law assume a greater degree of significance than those held by advocates of this measure. In his book, "The Price Discrimination Law," [16] he clearly acknowledged that:

> There is strong reason to believe that the statute has afforded effective protection against the price-cutting activities of predatory would-be monopolists and that it has substantially reduced the discriminatory advantages in price enjoyed by large buyers * * * That the previous advantages of large buyers have been curbed is apparent. Brokerage payments to chain stores have become infrequent. Allowances and services are more broadly available than before. When payments are made for advertising, care is usually taken to see that the advertising is actually provided. Price differences in favor of the big buyer have been eliminated in some cases and reduced in others. Under revised discount structures, more customers are usually eligible for discounts. The big buyer's pressure on sellers for price concessions has diminished.
>
> Though these sweeping conclusions are supported by fragmentary evidence as to concerns involved in cases in which the FTC issued orders, the available information all points in the same direction. In a large number of interviews with sellers and with buyers who had formerly been both favored and disfavored, opinions consistent with what has been said above were general, though there was a reiterated opinion that effects of this kind have been reduced through covert violation of the Commissioner's orders. What could be ascertained about the effects of orders in particular cases tended to support the broad opinions.
>
> A. & P. and Atlas Supply Company no longer receive their former concessions in the form either of brokerage or of discounts, and those who supply A. & P. and the oil companies served by Atlas Supply Company have experienced less buying pressure. The payment of overrides by United States Rubber Company continues only to the oil companies that are not customers of the company. The buying advantages of Aloe Company on medical supplies have been substantially reduced. Volume discounts have been dropped entirely by Sherwin-Williams Company, Pittsburgh Plate Glass Company, Morton Salt Company, International Salt Company, Simmons, American Optical Company, Master Lock Company, Jacobs Manufacturing Company, and the producers of frit. The spread between the highest and lowest prices has been substantially reduced in the discount structures of National Biscuit Company, Standard Brands, and John B. Stetson. Off-scale selling for the benefit of large buyers has been entirely abandoned in some cases and narrowly circumscribed in others. Even Minneapolis-Honeywell, which successfully defended itself in the price discrimination proceeding, reduced the spread in its discounts and abandoned off-scale selling.

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[16] Pp. 622–623, published by the Brookings Institute, December 1959.

Moreover, discount structures have been so modified that discounts have become more widely available to relatively small enterprises. This is conspicuously true for the packaged biscuits bought from National Biscuit Company, for the bakers yeast bought from Standard Brands, for the educational supplies bought from American Crayon Company and Binney & Smith, and for the roofing bought from Ruberoid Company.

D. VIEWS OF TWO LEADING EXPERTS IN ANTITRUST LAW

This Subcommittee was indeed fortunate to have had the benefit of hearing the views of the many witnesses who appeared before it or submitted statements and who are experts in the important field of antitrust law. However, without wishing to make invidious distinctions regarding these witnesses and their respective valuable testimony, attention is invited to the views of two attorneys who are acknowledged as being great experts in the field of antitrust law, namely the Honorable Earl W. Kintner [17] and Jerrold G. Van Cise, Esquire.[18]

(1) Some Highlights of the Honorable Earl W. Kintner's Testimony

The Honorable Earl W. Kintner, who is a former General Counsel and former Chairman of the Federal Trade Commission, testified at length before the Subcommittee concerning the Robinson-Patman Act.[19] It is deemed to be of importance that at the beginning of his testimony, he stressed the fact that the Robinson-Patman Act is a non-partisan measure and was enacted as a bi-partisan law and stated: [20]

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[17] [Mr. Kintner's biography follows:]

[From Who's Who in America, 38th edition, 1974–75, vol. 1]

EARL WILSON KINTNER

Kintner, Earl Wilson, lawyer; b. Corydon, Ind., Nov. 6, 1912; s. Lee and Lillie Florence (Chanley) K.; A.B., De Pauw U., 1936; J. D., Ind. U. 1938; LL.D., De Pauw U., 1970; m. Valerie Patricia Wildy, May 28, 1948; 1 son, Christopher Earl Mackelean; children by previous marriage—Anna Victoria, Jonathan M., Rosemary Jane (dec.). Admitted to Ind. bar, 1938, U.S. Supreme Court bar, 1945, D.C. bar, 1953; practice in Princeton, Ind., 1938–44; city atty., Princeton, 1939–42; pros. atty. 6th Ind. Jud. Circuit, 1943–48; dep. U.S. Commr. UN, War Crimes Commn., 1945–48; sr. trial atty. FTC 1948–50, legal adviser, 1950–53, gen. counsel, 1953–59, chmn, 1959–61; pres. Fed. Bar Bldg. Corp. Del., chmn., com. hearing officers Pres.'s Conf. of Administrv. Procedure, 1953–54; mem. panel on invention and innovation U.S. Dept. Commerce, 1965–66; mem. U.S. Administrv. Conf., 1970—, Bd. dirs. D.C. Legal Aid Soc., 1963—, pres., 1973; bd. visitors Ind. U. Law Sch., 1964—, chmn., 1937. Served from ensign to lt. USNR, 1944–46. Recipient Distinguished Service award Ind. U., 1960. Distinguished Alumni award DePauw U., 1965. Mem. Fed. (pres. 1956–57, 58–59), Am. (chmn. administrv. law sect. 1959–60, council antitrust law sect. 1958–61), N.Y. (exec. com. antitrust sect.) bar assns. Fed. Bar Found. (pres.), Am. Judicature Soc. (dir. 1961–64), Am. Arbitration Assn. (panel arbitrators), Am. Legion, D.A.V, Sigma Delta Chi, Phi Delta Phi (pres Province II 1962–67), Pi Sigma Alpha, Delta Sigma Rho, Lambda Chi Alpha. Republican. Episcopalian. Clubs: Cosmos, National Lawyers (pres.), National Press, Capitol Hill (Washington); Union League (N.Y.); Coral Beach and Tennis (Bermuda). Mason (32 dg., Shriner). Author: An Antitrust Primer, 1964; A Robinson-Patman Primer, 1970; A Primer on the Law of Deceptive Practices, 1971; A Merger Primer, 1973. Editor: The United Nations War Crimes Commission and Development of the Laws of War, 1948; The Hadamar Trial. 1948; FTC staff legal manual, 1952. Home: 3542 Newark St NW Washington DC 20016 Fed Bar Bldg Washington DC 20006.

[18] Biography of Jerrold G. Van Cise.

Born Roseville, New Jersey May 21, 1910; Member of the Bars of New York since 1936 and Washington, D.C. since 1956; Education: Princeton University, B.S., 1932, Yale Law School, J.D., 1935; Member: American Bar Association, Chairman, Antitrust Sec. 1959–60, New York State Bar Association, Chairman, Antitrust Sec. 1961–62; Partner in law firm of Cahill, Gordon & Reindel, New York, New York; Author: "The Federal Antitrust Laws," "Understanding the Antitrust Laws," as well as a great many articles, monographs, speeches, etc. on antitrust laws including chairing symposia on antitrust.

[19] Hearings, pt. 1, pp. 222–275.

[20] Hearings, pt. 1, p. 222.

> * * * I have been, all my life, an adherent of the Republican Party. I was made General Counsel of the Federal Trade Commission early in the Eisenhower administration, and I was the last Eisenhower Chairman of the Trade Commission.
>
> I have supported, in many ways, many Republican Members here on the Hill and have given them encouragement as well as other support. So that I have remained, to that extent, active in my party.
>
> I regard the Robinson-Patman Act as having no reference to politics whatsoever. It was—as has been pointed out to this subcommittee—a bipartisan effort. Small business, and a great deal of medium-sized and large business, support the Robinson-Patman Act as a law. I know that it is absolutely bipartisan; it has bipartisan support in business in the same way. I see no political implications in the Robinson-Patman Act. It should be supported, in my judgment, by Republicans, Democrats, and Independents alike.

Mr. Kintner testified that his experience in both prosecuting and defending Robinson-Patman Act cases has convinced him that this statute is an essential and effective component of the American antitrust laws and policy, and that a decision to either substantially amend or repeal it:

> * * * would have terrible negative consequences on the thousands of small businesses which the Act is designed to protect, as well as on the competitive market philosophy which is the lifebreath of our free enterprise system.[21]

It is Mr. Kintner's view that the rationale behind the Robinson-Patman Act is as valid now as it was when passed in 1936 since one of the primary purposes of the antitrust laws is to encourage smaller businesses to compete with their larger rivals. The Robinson-Patman Act is a crucial tool through which this national policy is implemented.

By nipping in the bud price favoritism, the Robinson-Patman Act is able to forestall eventual Sherman Act difficulties which would likely arise if the price discrimination were permitted to continue. Thus, the Act serves to complete and make more efficient the prohibitions contained in the other antitrust laws, and to ease enforcement difficulties which would otherwise arise.

This witness pointed out that the Federal Trade Commission and the courts have made findings of fact in numerous cases involving countless situations where discriminatory practices were used and that those actions, plus the interpretations of law by the courts, including those of the Supreme Court, have clarified the meaning of the provisions of the Robinson-Patman Act. He pointed out that this has provided ample precedents to serve as a basis for businessmen and attorneys to know and understand the meaning of the provisions of the Robinson-Patman Act. This invaluable record of precedents and judicial interpretation of the law would be discarded and rendered useless if the proposed so-called "reform" or outright repeal of the Robinson-Patman Act be effected, and if that ill-advised course should be fol-

[21] Hearings, pt. 1, p. 223.

lowed, it would indeed create enormous legal fees in any attempt to enforce the proposals. He characterized the proposals as a "lawyer's relief Act" [22] because it would necessarily result in a vast volume of new litigation in order to understand its meaning and legal consequences. Mr. Kintner concluded his testimony with these words: [23]

> I want to conclude by emphasizing that, as a whole, I believe that it would be a grave mistake to make wholesale amendments to or substantially repeal the Robinson-Patman Act. The statute as written is a shining example of our Government's concern for small businesses, and for the maintenance of basic business morality and competition.
>
> The Robinson-Patman Act is most assuredly not an anachronism that needs to go the way of fair trade legislation. It is a vital and effective piece of legislation that, when properly understood, deserves and receives the support of consumers and businessmen through this great land of ours.

(2) *Some Highlights of Jerrold G. Van Cise's Testimony*

Another very prominent attorney and author, with more than 40 years of experience and practice in the field of antitrust law, and particularly with the Robinson-Patman Act, is Jerrold G. Van Cise, Esquire, of the New York Bar.

For over 25 years, he has conducted antitrust programs for various bar associations and for the Practicing Law Institute. He also served as the Chairman of the American Bar Association's antitrust section.

Mr. Van Cise noted that over the years, the Federal Trade Commission and the courts have hammered out case by case what makes sense from the point of view of reconciling the Robinson-Patman Act with the Sherman Act. He then stated: [24]

> When that occurred, I then became a very devout advocate of the Robinson-Patman Act, whereas before I was probably as outspoken a critic as existed.

In his testimony, the witness explained how the Robinson-Patman Act has been clarified. He said that he finds no problem as far as section 2(a) is involved concerning price discrimination, nor should any attorney have any problem with section 3 of the Clayton Act, and he should also have a pretty good idea about section 7.[25]

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[22] Hearings, pt. 1, p. 231.
[23] Hearings, pt. 1, p. 236.
[24] Hearings, pt. 2, p. 200.
[25] Hearings, pt. 2, p. 218.

Chapter VII. Prior Hearing Held by the House Select Committee on Small Business Regarding the Robinson-Patman Act

A. EARLY ACTIVITIES REGARDING ANTITRUST LAW

Early in 1941, when the dark clouds of World War II gathered on the horizon, complaints began to flood into Washington that civilian industries could not obtain essential materials. Allegations were also made that small business was being subjected to discrimination in various ways [1] and it was feared that unless steps were taken to correct this situation, the small businessman would disappear.

In the light of conditions existing at that time, Members of the House deemed it imperative that Congress take immediate action. Accordingly, on August 12, 1941, the late Representative Wright Patman (Democrat of Texas), who was the co-sponsor of the Robinson-Patman Act, introduced in the House of Representatives, a Resolution to conduct a study and investigation of the National defense program in its relation to small business by a select committee.[2] On December 4, 1941, that Resolution was agreed to by the House, just 3 days before the infamous attack on Pearl Harbor. That was the genesis of the Select Committee on Small Business when it was first established in 1941, the forerunner of the present standing committee.

In 1946, the Committee's professional staff made a study in depth of the monopoly problem and its report entitled "United States Versus Economic Concentration and Monopoly" was issued.

During the 1st session of the 80th Congress, the Committee held executive hearings at which representatives of the Department of Justice and the Federal Trade Commission appeared and testified regarding the enforcement of the antitrust laws in connection with alleged violations by the tire industry. From the evidence presented at that time, it appeared to the Committee that the difficulties of independent tire dealers were in large part due to the failure of the Government to effectively enforce the appropriate statutes.[3]

A series of 11 hearings was conducted during the summer and autumn of 1948 on the problems of small business resulting from monopolistic and unfair trade practices in the following cities: Butte, Mont.; Casper, Wyo.; Salt Lake City, Utah; Kansas City, Missouri; Omaha, Nebr.; Minneapolis, Minn.; Madison, Wis.; Washington, D.C.[4] At these hearings, independent businessmen from the steel, oil, motion picture exhibition, food, auto parts, motor rebuilding, and many other industries, testified regarding alleged predatory practices which they charged threatened their existence and the future of free enterprise.

In the Committee's report,[5] based upon those hearings, 16 recommendations were made, and the importance of the antitrust laws was

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[1] Congressional Record, Oct. 10, 1941, p. 7836; December 4, 1941, p. 9418, p. 9422.
[2] H. Res. 294 (77th Cong., 1st Sess.).
[3] H. Rept. 1229 (80th Cong., 1st sess.), p. 3 (1947).
[4] H. Rept. 2466, p. 2 (80th Cong., 2d sess., 1948).
[5] "Monopolistic and Unfair Trade Practices," H. Rept. 2465 (80th Cong., 2d sess., 1948).

stressed. The report also emphasized that "Small business is the remaining bulwark of capitalism in the United States" and "In any sound capitalistic system, small business will always be the necessary keystone in the arch of prosperous free enterprise." [6]

During June 1948, the Committee investigated complaints of unfair methods of competition and related subjects dealing with the distribution of petroleum products. Early that year, a staff report was printed on the "Fuel Oil Situation in the East and West North-Central States." [7]

Investigation of antitrust law enforcement agencies

(1) It appeared there had been a general belief that the Federal Trade Commission had not been protecting small business adequately and that its enforcement of the Robinson-Patman Act, in particular, was ineffective. Attention was called to the inordinate amount of time required by the FTC to arrive at its decision, to its failure to enforce its own orders, to the dangers in the trade practice conference program, and to the general weakness of its application of the Federal Trade Commission and Clayton Acts.

In May 1950, the Committee launched its direct investigation of the functional operation of the Federal Trade Commission and during June of that year, the Committee conducted public hearings. At these hearings, representatives of small business were invited to testify concerning ways and means whereby the Commission could improve its methods of operation and generally add to its effectiveness in ridding industry of those elements detrimental to small, competitive business.

It soon became evident that any comprehensive investigation of the FTC would tell only half a story, since the Department of Justice, Antitrust Division, exists as the Federal Trade Commission's copartner in executing the policy of the antitrust laws. In addition, the Department of Justice has exclusive jurisdiction to enforce certain other statutes, such as the Sherman Antitrust Act.

In July 1950, the Committee directed two questionnaires to the then head of the Antitrust Division covering among other pertinent matters, relations between the FTC and the Department of Justice in handling antitrust cases and the development of a unified antitrust law policy. The efforts of the Committee's investigations in this area and its findings are stated in a preliminary report of the Committee entitled "Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division, Department of Justice.[8]

The records, investigations, hearings and reports made by the House Small Business Committee show that as progress was made on the clarification and application of the Robinson-Patman Act, representatives of some of those against whom it was applied not only protested but also unsuccessfully defended themselves in the proceedings against them. They also developed and advanced programs and fallacious arguments to the effect that the Robinson-Patman Act is anticompetitive and should be amended or repealed outright. For example, with reference to the *Cement Institute* [9] case, representatives of the respondents undertook a campaign to influence public opinion in much the same

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[6] *Supra*, p. 32.
[7] Committee print, Feb. 11, 1948.
[8] H. Rept. 3236 (81st Cong. 2d Sess.).
[9] *Cement Institute* v. *Federal Trade Commission*, 333 U.S. 683 (1948).

manner as they were reported to have proceeded during the trial of the first cement case in 1925.

Soon after the Federal Trade Commission had undertaken its investigation of the pricing practices in the cement industry, the leaders of that industry formed a public relations committee. It was given the responsibility of organizing a campaign to "educate" the public to an appreciation of the industry's "marketing practices."

According to paragraph 21 of the Federal Trade Commission's findings as to the facts in the above-entitled case, a combination of interests in the cement-manufacturing industry adopted plans and followed concerted courses of action directed toward allaying public criticisms that the pricing of portland cement was noncompetitive and seeking to convince the public that there was no collusion among cement manufacturers. Also, according to those findings, a committee on public relations of the Cement Institute and other various important figures in institute affairs began working assiduously on the problems arising from criticisms of the industry. That committee on public relations made a study of the problem and secured from the members of the committee and other leaders in the Cement Institute detailed proposals on how to meet the problem. After the committee on public relations of the institute had studied those problems, on April 10, 1934, it submitted an elaborate program to improve the public relations for the cement industry. It described its objective as including the replacement of the public belief that portland cement was not priced competitively. In that connection, it suggested the bringing to the public an appreciation of the industry's "marketing practices."

The announcement of the plan emphasized that:

> No matter how clever the planning, adroit the arguments and skillful the execution, no matter if the expenditure be most liberal, a public-relations program will fail unless * * * the proponents themselves are fully convinced.

It was then outlined that the cement company executives and employees must be "sold" on the public-relations program, and that they and all others who could speak for and on behalf of the cement industry then arrange to put across the public-relations program through personal contact, public addresses, printed matter, publicity, paid advertising space, radio, and moving pictures. The plan also included among those who must at the outset be reached and convinced were public officials immediately concerned with the problem of purchasing cement for public use, as well as leaders in private industry who had to do with the handling of cement for private use. The "plan" tabulated the approximate number of leaders of groups to be convinced as—

1. Federal officials	695
State officials (including highway engineers)	291
2. Newspapers:	
Primary list	2,500
2d-class list	2,500
Magazines and journals	250
General and economic writers	200
Financial editors and writers	305
3. United States Senators and Representatives	531

4. State senators	1,661
State representatives	5,662
5. County commissioners	8,704
County engineers	2,200
Mayors and city managers	5,750
City engineers	2,120
6. Buildings-materials dealers, about	30,000
7. Civic leaders	7,500
Financiers	15,000
8. Contractors, all lists	40,000
9. Concrete products manufacturers	6,500
10. Engineers (civil)	2,100
Architects	14,500
11. Cooperating organizations	250
12. Other industries on common ground	4,674
Total	[1] 153,853

[1] See Commission's exhibit 2190, FTC docket 3167, In the Matter of Cement Institute, et al.

The president of the Lone Star Cement Co., one of the respondents in the second cement case which was brought by the Federal Trade Commission in 1937, wrote in 1934 about some of the things that had been done by the cement industry to allay the suspicions of the public about the pricing practices in the cement industry. In that connection he referred to an institutional advertising campaign that was being carried out at the time to relieve customers' doubts on that score:

> Telling interesting facts about cement has failed to remove the public distrust which probably has its origin in the suspicion that a close working understanding, contrary to the public interest, exists between manufacturers. This suspicion is intensified by some of the industry's trade practices.[10]

Among the 10 practices that he named as needing to be "explained" in order to allay public suspicion, the following were prominent: Product standardization, uniform destination prices, cross shipping, failure to grant volume discounts, and finally "limitation of competition to a point of sale struggle for an order with all natural differences between companies and products removed." [11]

A survey was made by the industry to determine the most effective way of selling the public on the notion that these practices worked to the customer's advantage. Subsequently, a large-scale public relations program was inaugurated to "replace the misconceptions with a favorable attitude." [12]

The elaborate public relations fiction left something to be desired by way of economic logic, however. As one of the Cement Institute trustees wrote to a member of the NRA Code authority in 1934:

> Do you think any of the arguments for the basing-point system, which we have thus far advanced, will arouse anything but derision in and out of the Government? I have read them all recently. Some of them are very clever and ingenious. They amount to this, however, that we price this way in order to discourage monopolistic practices and to preserve free competition, etc. This is sheer bunk and hypocrisy.[13]

[10] FTC Docket 3167, Commission's findings, p. 120.
[11] Commission's exhibit 553–X–20. FTC Docket 3167, pp. 120–122.
[12] Commission's exhibit 3190–A. FTC Docket 3167.
[13] Letter from John Treanor, Commission's exhibit 7–B, FTC Docket 3167, p. 126.

Following this was the classic statement which has been quoted in and out of context by writers ever since:

> The truth is, of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined. . . .[14]

Hoping to put its new economic concepts on a somewhat sounder basis, the institute tried without success to interest the FTC in making a study of the basing-point system with the industry's "cooperation." Then in 1934, it hired two Columbia University economics professors, J. M. Clark and Arthur R. Burns, to make their study, with the plan, as the president of Riverside Cement Co. put it, of "attempting to mold the professors' minds before any definite conclusions have been reached. * * *"[15]

The filing of the complaint by FTC against the Cement Institute dashed the industry's hope of a positive program of wooing public opinion. The degree to which the industry was successful in "molding" the professors' minds was not made known for the study had lost its timely purpose and was never published. The industry turned its attention to marshaling economic evidence to support its claim that it was a smoothly functioning competitive industry whose prices were the natural outcome of a competitive structure.

In hearings before the Commission, the institute brought economic witnesses to attest to the fact that monopoly is not the automatic and inevitable conclusion to be drawn from the existence of price identity since perfect competition also brings about a single uniform price. The facts of the case made this argument largely academic. The Commissioners were not visibly impressed with the suggestion that the competition was responsible for the identity of sealed bids, for which the industry was noted, and added:

> When—as in the sale of cement—the price is established by the seller, the price leadership of the governing base mill is accepted by other sellers and there is not bargaining between buyers and sellers, fundamental requirements of a true market in the economic sense are lacking, and prices are not the result of market action in a true economic sense but merely expressions of a noncompetitive or monopolistic price structure.[16]

As a result of the decisions in the *Conduit* and *Cement Institute* cases, the basing-point interests joined in a unified effort to legalize basing-point prices. The pressures which they brought to bear took various forms, both covert and open; the weakening and the nearly successful attempt at evisceration of the antitrust laws is a continuing tribute to their determination and devotion to self-interest.

When it was realized that the cement industry arguments in defense of its basing-point pricing system had failed to influence either the Federal Trade Commission or the Supreme Court of the United States, and it appeared likely that the Federal Trade Commission would then

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[14] Ibid, p. 126.
[15] See Commission's exhibit 571–2L, 2M, FTC 3167, p. 127.
[16] FTC Docket 3167, Commission findings, p. 128.

proceed against the basing-point system of pricing used in the iron and steel industry, the leaders of the latter industry expressed alarm.

The Supreme Court in the *Cement Institute* case in 1948 upheld the Federal Trade Commission's interpretation of the Robinson-Patman Act in its Order against further violations of that Act by the respondents. However, as hereinbefore noted, representatives of the interests common to that of respondent's sought to amend or repeal that Act. Legislation proposed to that end was introduced and considered in the Congress. Actually, one such measure was passed in the 81st Congress—S. 1008—but was vetoed by the President in June 1950.

Subsequently, there was organized what became known as "The Attorney General's National Committee to Study the Antitrust Laws." The committee as it finally evolved, numbered 61 members. This number, as the testimony indicated, had no mystical significance, but was simply the net result of a mammoth process of elimination. What is of more interest than the number who were represented is the process by which the rest were eliminated.

Professor Oppenheim quoted the Attorney General's statement that the selection for membership—

> will be guided by the broadest viewpoint of what is best for the American economy rather than what benefits may accrue to any particular industry, any specific business, or any individual's reputation.[17]

B. ACTIVITIES DURING THE 84TH CONGRESS (1955–56)

1. *Robinson-Patman Act and Related Matters.*—When the House Small Business Committee was reorganized, it was determined that the full committee would undertake to study and report on the general subject of price discrimination and other related matters affecting small business.

The committee had been in operation hardly 2 months when the "Report of the Attorney General's National Committee to Study the Antitrust Laws" [18] was issued. In a speech on the House floor, Chairman Patman analyzed the proposals made in that report and expressed his views in rather critical terms.[19]

During October and November 1955, the committee held extensive hearings on price discrimination and related matters. The printed record of the hearings contained well over 1,200 pages of testimony and supplementary statements of half a hundred witnesses. From that record, three facts stood out unmistakably clear. First, in theory, economists recognize that price discrimination is a weapon of monopoly, and a threat to healthy competition. Second, in practice, small businessmen know that price discrimination in the hands of large competitors puts them at an unmerciful disadvantage, quite unrelated to competitive merits, and frequently results in their destruction by less efficient but more powerful competitors. As a consequence, they con-

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[17] Record of hearings on current antitrust problems before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, reprinted in the record of hearings on price discrimination before the Select Committee on Small Business, House of Representatives, November 1955. p. 1127.

[18] The Attorney General was Herbert Brownell, Jr., and the report of his committee is dated March 31, 1955.

[19] Congressional Record, March 31, 1955, p. 4140; final report of committee, pp. 129–130, H. Rept. 2970 (84th Cong., 2d sess.).

sider the Robinson-Patman Act [20] prohibition of price discrimination to be the Magna Carta of small business.[21] Finally, in contrast, the Attorney General's report considered price discrimination to be a desirable form of competition.

In discussing the practical reasons, as distinguished from the advertised criteria, for choosing the members of the Attorney General's National Committee to Study the Antitrust Laws, the real issue was generally sidestepped. Professor Oppenheim said in his testimony:

> I will explain why men were selected. It would be unfair to them to explain why they weren't.[22]

Nevertheless, it is difficult to find any straightforward statement of the real basis for the choice of the particular members who actually participated in the committee's deliberations, any more than for the rejection of others.

From the beginning, it was the announced purpose to achieve a balanced representation of expert opinion. This involved two basic criteria: Expertise and balance. Of the first test, Professor Oppenheim's law review article had emphasized:

> Every major appointment should meet the tests of qualifications and experience generally recognized as outstanding in competence and expertness commensurate with the assigned functions.[23]

The second standard, of representative viewpoints, was then to be applied to those who qualified under the first test.

Asked whether he believed that the standards enunciated in the law review article had guided the co-chairmen in their actual selection of the committee's membership, Professor Oppenheim replied without qualification:

> That represents in my opinion exactly the criteria which were used in the selection of the Attorney General's Committee To Study the Antitrust Laws.[24]

When it came to explaining the application of the criteria, rather than merely theorizing about them, however, Professor Oppenheim had considerable difficulty. In the hearings before this committee, the representativeness of the Attorney General's committee were challenged, and in answer, he pointed to a handful of members whom he considered to represent the interests of small business or vigorous antitrust enforcement. In return, it was pointed out to him that this in itself did not constitute balance.

A specific instance in which the membership appears to be particularly unbalanced was the inclusion on the committee of several attorneys who represented RCA in a patent suit brought by the Zenith Corp., and the exclusion of an attorney for Zenith. The latter, Mr. Thomas C. McConnell, had practiced for 20 years largely as a plaintiff's attorney in antitrust cases. From this, it would appear that he was

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[20] 49 Stat. 1526; 15 U.S.C. 13, 13a, 13b, 21a; Public Law 692, 74th Cong. (1936).
[21] H. Rept. 2970, p. 129 (84th Cong., 2d Sess.).
[22] Hearings on price discrimination before the Select Committee on Small Business, House of Representatives, Nov. 1955, at p. 246.
[23] 50 Michigan Law Review, p. 1239.
[24] Hearings on price discrimination before the Select Committee on Small Business, House of Representatives, November 1955, p. 234.

qualified for membership on the basis of expertise but was rejected for other reasons:

> The CHAIRMAN (Mr. Celler). Now may I ask you this: Was your named proposed for membership on this Attorney General's committee?
>
> Mr. MCCONNELL. Yes; it was * * * and the word came back that I was not acceptable because I was prejudiced on the issue.
>
> The CHAIRMAN. Any other reasons assigned?
>
> Mr. MCCONNELL. No, that is the only one I ever heard.[25]

In his testimony, Mr. McConnell named five members of the law firm representing the defendant in that suit, RCA, all of whom served on the Attorney General's committee. When Professor Oppenheim was questioned as to the circumstances leading to their inclusion on the committee, he said:

> Professor OPPENHEIM. Mr. Chairman, I am completely ignorant of who those six attorneys might be. I just must confess that I couldn't begin to tell you who is connected with whom, because I never looked into that. It may be, from general knowledge, if I am not mistaken, the Cahill, Gordon firm is one firm that was involved in that case. That comes from the publicity about the case. Maybe Jerrold Van Cise was connected with it.
>
> The CHAIRMAN. Since you admittedly weighed these members on their philosophy in determining whether or not they would be a member of the committee, I thought possibly you took that case into consideration.
>
> Professor OPPENHEIM. Oh, indeed not.[26]

With respect to this matter of "representativeness of interacting viewpoints," Mr. McConnell made the additional point that he knew of no instance of a "plaintiff's attorney"—that is an attorney who customarily represented clients seeking damages for injuries from alleged violations of the antitrust laws—who served on the committee.

Furthermore, although the cochairmen were evidently not concerned about duplication of viewpoint in the contribution of the five RCA attorneys, in other instances duplication was the cause for rejection.

For example, in answer to Mr. Roosevelt's question whether Thurman Arnold had been invited to participate, Professor Oppenheim made the following statement:

> In that particular connection we appointed Wendell Berge, and I can say for myself that I felt that Wendell represented the same type of thinking as Mr. Arnold did, since he served under him, and basically I think their philosophies were the same. We wanted, for example, John Lord O'Brien. We wanted Herbert Bergson. All of them were considered. It was just a question of selecting one former Assistant Attorney General who would fairly represent what we thought

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[25] Record of hearings on current antitrust problems before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, p. 404.

[26] Hearings on Price Discrimination before the Select Committee on Small Business, House of Representatives, November 1955, p. 261.

would be the interacting view of an administration where there was vigorous antitrust enforcement, which I endorse.[27]

He added that he personally wished Mr. Bergson had been a member. In answer to Mr. Roosevelt's further question of whether he had not thought of replacing Mr. Bergson with Mr. Arnold, however, Professor Oppenheim replied that he had not, since it was felt that Mr. Arnold's philosophy was so well represented by Wendell Berge.

Co-chairman Stanley N. Barnes testified that one consideration in the selection of members for the committee was a determination to avoid selecting more than one member from any given law firm.[28] However, he failed to explain why that standard and criterion was discarded and ignored when it came to considering and selecting members from the Attorney General's old law firm, Lord, Day, Lord, New York, N.Y. It so happens that that law firm contributed two of its members to the membership of the Attorney General's Committee. They were Parker McCollester, Esq. (who died before the Report was published) and Thomas F. Daly, Esq.

Also there was no apparent reluctance to duplicate other points of view—a case in point being the friendly little group which has been whimsically called the Quote Club. The related issued of "Effective Competition" and the substitution of a rule of reason for per se legislation appeared to be an object surely basic to the committee's study. And on these questions, the group consisting of William Simon, Morris Adelman, Blackwell, Smith, Breck McAllister, Professor Oppenheim, and former FTC Chairman Howrey, spoke with one voice, quoting one another copiously as authority for the novel viewpoint they have advocated that the antitrust laws should be applied with a "rule of reason" approach. If ever there was a controversial area in which counterbalancing weight appeared needed, it was in that area. But unfortunately, it appears that a prospective member's inclusion or exclusion depended largely on which philosophy would be duplicated by his participation.

In spite of his emphasis on "representativeness of interacting viewpoints," moreover Professor Oppenheim parried a request for information which would permit a systematic evaluation of the weighting of the committee:[29]

> Mr. ROOSEVELT. Mr. Chairman, instead of reading a lot of names, I would be interested in having the witness submit later a breakdown as to the weight of the committee.
>
> The CHAIRMAN. That's right.
>
> Mr. ROOSEVELT. How each was chosen, so we can see who he thinks are the friends of the antitrust law, and those who he thinks will be in an opposite position.
>
> Professor OPPENHEIM. Mr. Roosevelt, it is very hard to categorize people that way on the antitrust issue.
>
> Mr. ROOSEVELT. That is what you said you did.
>
> Professor OPPENHEIM. They represent all shades of opinion, sir. It is impossible in a field like this to categorize everyone as being in favor of just one attitude all the way through.

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[27] Id., at p. 257.
[28] Id., at pp. 810–811.
[29] Hearings on Price Discrimination before the Select Committee on Small Business, House of Representatives, November 1955, p. 243.

How it was possible to determine that philosophies were not duplicated and that all interacting viewpoints were represented without inquiring into the affiliations of the 46 attorneys who made up the bulk of the committee membership still remains unanswered. At issue, there is a clash of basic philosophies. Professor Oppenheim testified that the Attorney General's committee was a legally constituted committee appointed by the Attorney General and approved by the President. The issue is not merely the legality of that committee in its inception,[30] but the legitimacy of its use.

Of primary importance is also the question of balanced representation. Of the 46 lawyers on the committee, it was established that at least 39 were attorneys for defendants (past or pending) before the Federal Trade Commission or the Department of Justice. Of the practicing lawyers, 26 were directly, or through their law firms, connected with defendants in antitrust proceedings pending before the Department of Justice or the Federal Trade Commission at the time of their participation in the Attorney General's committee. Twenty-three of these, and an additional 13 had been similarly connected with defendants in antitrust cases in the past. None of the lawyers on the committee is known to be a so-called plaintiff's attorney, regularly representing the interests of plaintiffs in triple-damage suits under the antitrust laws.

Although President Eisenhower had announced the expressed hope that the Attorney General's National Committee to Study the Antitrust Laws would prepare the way for "modernizing and strengthening" laws against monopoly and unfair competition, Attorney General Brownell later made perfectly clear the objective of his Committee when he stated: "Our aim was to gather articulate spokesmen for responsible points of view to formulate future antitrust policy." [31]

The recommendations of the Attorney General's National Committee to Study the Antitrust Laws obviously were not to rest on any empirical findings as to the efficiency of antitrust enforcement, but on the contrary represent a composite opinion. In effect, he stated it was clear the analysis was to be made in terms of preconceived notions as to what antitrust philosophy should be. And, therefore, the report of necessity must be judged not only on its conclusions but also on its premises.

One of the purposes of that Attorney General's Committee was to make sure that the Federal antitrust policy would be revised to accommodate the views of its members respecting "effective competition." [32]

The report made by the Attorney General's National Committee to Study the Antitrust Laws, as published and distributed on March 31, 1955, contained conclusions that the Robinson-Patman Act should be amended through the repeal of some provisions and considerable weakening of other provisions and recommendations made to the Courts that the courts consider such results through the process of judicial interpretation in the event Congress did not legislate to that effect.

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[30] There may in fact be some question as to the legality of the committee under Title 31 of the United States Code, sec. 665, which prohibits any officer, or employee of the United States to accept free or voluntary service for the Government except in an emergency involving human life or the protection of property.

[31] Record of hearings on price discrimination before the Select Committee on Small Business. House of Representatives, November 1955, p. 813.

[32] H. Rept. 2966 (84th Cong. 2d Sess. 1956), page 53.

It should be noted that copies of the Attorney General's 1955 Report were forwarded to all Federal judges in the country inasmuch as the courts in which such judges preside are invested with jurisdiction and authority to consider the Robinson-Patman cases which may be brought before them.

Professor Louis B. Schwartz of the Law School, University of Pennsylvania, one of the members of the Attorney General's committee who dissented from the position taken by the majority in the report, stated:

> The majority report would weaken the antitrust laws in a number of respects, and, even more important, it fails to adopt necessary measures for strengthening the law so as to create a truly competitive economy in this country. On 30 specific issues discussed in this dissent, the report takes a position inimical to competition, either by approving existing narrow interpretations or by suggesting additional restrictions.

In testifying on the matter before the Committee on the Judiciary, House of Representatives, the late Senator Estes Kefauver, in referring to the report, stated: "It is a gigantic brief for the nonenforcement of the antitrust laws." [33]

The House Small Business Committee, therefore, took sharp issue in its report [34] with the Attorney General's group.

The Committee's report made a number of findings, some of which are as follows: [35]

> It was noted at the commencement of the committee's hearings on price discrimination, the Robinson-Patman Act and related matters, that one of the objectives of the inquiry would be to determine whether the practice of price discrimination is used and to get some indication of the extent and result of its use. To that end many witnesses testified about facts of present-day discrimination in price. A number of those witnesses are operators of small businesses. Others spoke for organizations of small-business firms which had experienced the impact of price discrimination.
>
> Among the operators of small-business firms, who appeared and testified about the practice of price discrimination, were a number of wholesale bakers. It should be borne in mind that when we use the term "wholesale bakers" we are referring to bread manufacturers, therefore the reference is to a manufacturing industry. The salient details of their testimony are set forth in this report (pp. 207–221). Their testimony dramatically outlined the fact that large chain grocery firms and large national wholesale bakery concerns are discriminating in prices with the effect of eliminating small and independent wholesale bakers. Underlined is the fact that the rate of mortality among the small bakers is alarmingly high and is due largely to the fact that their large nationwide competitors are practicing price discrimination. For example, with the

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[33] Record of hearings on Current Antitrust Problems before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, May 1955, at page 11.
[34] H. Rept. No. 2966 (84th Cong. 2d Sess.) December 19, 1956.
[35] Supra., pp. 213–215, 217.

cost of producing and selling a pound loaf of bread, approximating 14 cents, it was found that in one area a national chain baker made a price of 12 cents per pound loaf in an area served by a local small baker. The chain was in a position to recoup any losses it sustained in that area. It was charging 16 cents per pound loaf of bread in some other areas. The local baker had no opportunity to recoup any losses it was compelled to sustain in serving its local area.

The testimony shows that in another area the nationwide manufacturer of bread, Ward Baking Co., was selling its Tip-Top bread, a 10-inch 16-ounce loaf, for 17 cents wholesale in its primary market, Pittsburgh and western Pennsylvania. At the same time, in West Virginia, in Monongalia and Marion Counties, where a small manufacturer of bread doing a local business was their competitor, Ward was selling its Tip-Top bread in units of a 12-inch 18-ounce loaf for 15 cents wholesale. (Although marked 18 ounces, some of its loaves weigh as much as 21 ounces.) It appears that Ward did that to "meet the competition" of the local bakers who were selling a 10-inch 14-ounce loaf for 14 cents wholesale (or 1 cent per ounce). In "meeting that competition" Ward's slogan was "Five more ounces for one more cent." In addition, Ward, the large nationwide manufacturer of bread, utilized resources from the revenue it secured from the sale of bread at 17 cents per pound loaf and higher in some areas to put on advertising and promotional campaigns for limited periods of time in selected local areas such as the one in West Virginia described above. Those advertising and promotional campaigns included the giving of bread freely to housewives along the routes of the local bakers and to small retail grocers to be given to the housewives. (See pp. 216–217 of this report.)

Not all of the complaints about discriminatory practices in the manufacturing and sale of bread were leveled at the large nationwide bakers; one of the bitterest complaints made by some local manufacturers of bread was made about the practice of the Great Atlantic & Pacific Tea Co., a nationwide retail grocer chainstore organization. That complaint was to the effect that A. & P. selects certain areas in which it will sell its Jane Parker white bread, of its own manufacture, at prices approximating and below the cost of manufacture, while in other areas its prices are held high enough to yield a profit on the bread it sells. (See pp. 217–221 of this report.)

Since bread is only one of many items offered for sale in the thousands of stores operated by A. & P. throughout the country, it, of course, would be in a position to sell all of its bread at or below cost in all of its stores for a period of time until its competitors who depend solely on the sale of bread are eliminated from the picture.

A. & P. is not the only large chain grocer concern against which complaint has been made about the sale of bread at discriminatory prices. Complaints were also made about Loblaw and Kroger. (See p. 218 of this report.)

Complaints against these discriminatory practices in the industry of manufacturing and selling of bread have been made to the House and Senate Small Business Committees, the United States Department of Justice, and to the Federal Trade Commission.

Those complaints have been made and repeated over a period of years. Particularly strong complaints were lodged with the Federal Trade Commission 2 years ago and supplemented several times since then.

* * * * *

Additional testimony relating to the practice of price discrimination was presented by spokesmen for the representatives of many thousands of additional small and independent business concerns. Their testimony will be found in the record of hearings on price discrimination before the Select Committee on Small Business, House of Representatives, October-November 1955, and the following references to such testimony is to pages of the records of these hearings. Included is the testimony of Henry Bison, Jr., associate general counsel, National Association of Retail Grocers (pp. 400 et seq.), George J. Burger, vice president, National Federation of Independent Business, Inc. (pp. 203 et seq.), George H. Frates, Washington representative, National Association of Retail Druggists (pp. 311 et seq.), Clarence M. McMillan, executive secretary, National Candy Wholesalers Association, Inc. (pp. 451 et seq.), W. W. Marsh, executive secretary, National Tire Dealers & Retreaders Association, Inc. (pp. 464 et seq.), William A. Quinlan, general counsel and Washington representative, Associated Retail Bakers of America (pp. 701 et seq.), Watson Rogers, president, National Food Brokers Association (pp. 412 et seq.), Col. R. H. Rowe, vice president and secretary, United States Wholesale Grocers' Association (pp. 884 et seq.), John W. Nerlinger, Jr., executive secretary, and William D. Snow, general counsel, National Congress of Petroleum Retailers, Inc. (pp. 442 and 914), and Joseph Kolodny, managing director, National Association of Tobacco Distributors (pp. 900 et seq.).

The testimony of those witnesses substantiated earlier testimony received by the committee from bakers, gasoline dealers, and other operators of small-business firms that the practice of price discrimination is widely used and with damaging effect on small business and competition.

It is now clear from the unfolding history of events since the date of the publication and distribution of the report of the Attorney General's National Committee to Study the Antitrust Laws that a considerable lessening of enforcement activity of the Robinson-Patman Act has occurred. Moreover, since the date of that report, some of the persons who had served in the Department of Justice were later appointed to the Federal Trade Commission and their views were on occasion strongly expressed in opposition to the application of the Act. This can easily be seen in the opinions, both for the majority as well as in the dissenting views written by such persons who later became FTC Commissioners.

The reasons for having devoted so many pages of this report of the Ad Hoc Subcommittee to the prior hearings held and the reports issued by the former Select Committee on Small Business of the House of Representatives now should become obvious.

2. *Other reports regarding antitrust.*—The Committee continuously reviewed the record of the work of the Federal agencies charged with the duty of enforcing the antitrust laws. Particular attention was given to the enforcement of those laws and statutes which directly affect the small business sector of the economy. Out of these studies, developed staff reports on "Statistics on Federal Antitrust Activities" and on "Antitrust Complaints," both of which were issued as Committee Prints during the 84th Congress.

C. ACTIVITIES DURING THE 85TH CONGRESS (1957–58) THROUGH THE 90TH CONGRESS (1967–68)

The committee received many complaints alleging that law enforcement agencies failed to act timely and effectively under the antimonopoly laws to protect small business firms from predatory and other unfair trade practices.[36]

At the instance and under the direction of Subcommittee Chairman Evins, considerable investigation and study of this problem has been made. This has included the collection of data from the Antitrust Division of the Department of Justice; Federal Trade Commission; and the Packers and Stockyards Division, Agricultural Marketing Service, U.S. Department of Agriculture. The records of the enforcement activities of those agencies and other information available regarding law enforcement, including the available information about the role of private antitrust enforcement in protecting small enterprises, has been studied, tabulated, analyzed, and summarized.

During the period from the 85th Congress in 1957 through the 90th Congress at the conclusion of the year 1968, the House Small Business Committee considered a great variety of antitrust matters, some of which were:[37]

Distribution practices in the petroleum industry.
Small Business problems in the poultry industry.
Price discrimination in the dairy industry.
Small business problems in food distribution.
Mergers and superconcentration.
Operation and effect of antitrust consent decree in the West Coast Oil Case.
Federal Trade Commission's advisory opinion on joint ads.
Dual distribution and related vertical integration.
Packers and Stockyards Act.
Small business problems in the drug industry.

D. ACTIVITIES DURING THE 91ST CONGRESS (1969–70)

On August 11, 1969, the Chairman of the full Committee, Representative Joe L. Evins (D-Tenn.) established a special subcommittee

[36] H. Rept. No. 2718, p. 95 (85th Cong., 2d Sess.).
[37] "A History and Accomplishments of the Permanent Select Committee on Small Business of the House of Representatives," H. Doc. No. 93–197 (1973).

to inquire into and review reports prepared by certain groups, such as the White House Task Force on Antitrust Policy (Neal Report), the President's Task Force on Productivity and Competition (Stigler Report) and others, which were critical of the Robinson-Patman Act, its enforcement by the Federal Trade Commission, and antitrust enforcement policies essential to the survival of small business. To head this special subcommittee, Representative John D. Dingell (D-Mich.), was named as Subcommittee Chairman.

Extensive hearings were held by that subcommittee dealing with the subject of "Small Business and the Robinson-Patman Act" in Washington, D.C., on October 7–9, 1969, February 4–6, 26–27, and March 3, 4, and 11, 1970.

Subcommittee Chairman Dingell had his attention directed to the charges made by representatives of small business groups to the effect that the Federal Trade Commission and other agencies were not enforcing the Robinson-Patman Act against price discrimination practices which were injurious and damaging to small business. Also, it was noted that countercharges were being made by representatives of some large business enterprises and others representing similar interests, as well as by some staff members in the Antitrust Division of the Department of Justice and the Federal Trade Commission to the effect that enforcement of the Robinson-Patman Act is not in the interest of small business and may adversely affect competition.

In the course of the hearings, testimony on both sides of the issue were received. Fully aired were the positions expressed in the reports of the President's Task Force on Productivity and Competition,[38] White House Task Force on Antitrust Policy,[39] and in the Report of the ABA Commission to Study the Federal Trade Commission.[40]

The Honorable Caspar Weinberger, newly appointed Chairman of the Federal Trade Commission early in 1970, appeared and testified before Subcommittee Chairman Dingell.[41] He said that he had taken note of these charges and countercharges concerning the FTC's role in the enforcement of the Robinson-Patman Act. He promised that there would be an investigation made by the FTC for the purpose of securing, examining, analyzing and reporting upon the empirical evidence which would support or refute the charges being made.

This Special Subcommittee on Small Business and the Robinson-Patman Act in its Report [42] made a number of findings.

In regard to the criticism that the Robinson-Patman Act perpetuates the inefficient in business, the Dingell Subcommittee's report stated: [43]

> It was charged during the hearings that the Robinson-Patman Act conflicts with Sherman Act policy by perpetuating the inefficient in business. The subcommittee can find no reliable factual basis for this assertion, and the statistics of business failures, corporate mergers, and rising concentration tend to refute this hypothesis. The Robinson-Patman Act was

[38] Hearings "Small Business and the Robinson-Patman Act" (91st Cong., 1st Sess. 1969), Vol. 1 pp. 271–290.
[39] Supra, pp. 291–334.
[40] Supra, pp. 335–461.
[41] Supra, Vol. 2 beginning p. 828.
[42] H. Rept. No. 91–1617 (91st Cong., 2d Sess., 1970).
[43] *Supra,* pp. 43–44.

not designed to bar vigorous price competition between companies, and the intervening years since the passage of the act shows that its enforcement has not prevented businesses from being driven to the wall in the competitive process. The act does not hinder competition. Its purpose is to prevent large-power buyers from getting unfair purchase price advantages from their suppliers, to the disadvantage of smaller rivals. This protection, however, does not impose a ban on all price differentials as some critics have contended. Sellers are permitted to have different prices in different trading areas, and different prices for functionally noncompeting customer classes within trading areas. At the primary line, regional price cutting, even by sellers with substantial market shares, may be permissible.

The idea that normally price discrimination is prompted by impulses which would lead to improved functioning of the competitive process and that only in exceptional instances would price discrimination adversely affect competition has not been substantiated by any empirical data. The subcommittee is not aware of a single instance where unlawful price discrimination tended to accomplish an industrywide reduction of prices toward lower nondiscriminatory levels. If, in fact, price discrimination had the effect of promoting competition and lowering prices, it would seem reasonable to expect that the act's critics would be able to provide glowing examples of such procompetitive effects in industries not covered by the Robinson-Patman Act. In fact, the subcommittee finds that criticism after criticism leveled against the Robinson-Patman Act finds support only in abstract economic analysis. The subcommittee is not being critical of economists or of economic analysis. However, in order for the subcommittee to develop any valid conclusions as to the validity of these criticisms empirical data and hard evidence must be established upon which such premises and criticisms can be supported. The subcommittee finds that the most recurring of all these premises is the economic assumption that price discrimination is generally procompetitive and only exceptionally anticompetitive. Legislative and judicial history concretely show that both Congress and the courts have found the opposite to be true.

The need for empirical data on Robinson-Patman enforcement was expressed by that Special Subcommittee in these terms:[44]

The subcommittee finds that it is high time to dispense with this continuing verbal joust between the critics and proponents of the Robinson-Patman Act and its enforcement. Economic theorems and abstractions may be of use in terms of probabilities. However, in order for Congress and the Federal Trade Commission to arrive at determinations regarding the need for and effect of the Robinson-Patman Act, empirical data must be developed regarding the effect of the Robin-

[44] *Supra*, pp. 45–46.

son-Patman Act based upon: (1) the effect of its mere presence as a statute dealing with price discrimination (including private suits), (2) the effect of Federal Trade Commission activity in enforcing this statute, and (3) the Commission's pursual of compliance by companies against whom cease-and-desist and consent orders have been issued.

The subcommittee finds that the existing evidence and cases support the Robinson-Patman Act, and that the burden of persuasion is on the critics to develop hard evidence to support their denunciation of the act. The subcommittee agrees with the statement by Professor Brooks in his testimony at the hearings that "the substantive arguments against the Robinson-Patman Act are largely based on hypothetical possibilities of bad effects, or abstract thinking about what could happen if the law were badly administered rather than being based on objective consideration of actual cases that have been brought under Robinson-Patman." The subcommittee concludes that a thorough consideration of actual cases is needed before the criticism leveled against the Robinson-Patman Act by its opponents is given credence.

The subcommittee finds that Professor Brooks' analysis of 2(a) decisions by the Federal Trade Commission is illustrative of the type of research that could benefit those attempting to examine the true impact of Robinson-Patman enforcement on our economy. The subcommittee suggests that an examination of Professor Brooks' comments and recommendations would be of benefit both to the act's critics and to the Federal Trade Commission.

The subcommittee finds that on one point both the supporters and critics of the Robinson-Patman Act agree. There is almost unanimous agreement on the point that some clarification and modification of enforcement procedures by the Federal Trade Commission is warranted. On balance the subcommittee finds, however, that the Federal Trade Commission has done a creditable job as an independent agency and arm of the Congress. The Commission has been repeatedly sustained in its decisions by appellate courts and the U.S. Supreme Court and thus has an enviable record.

Chapter VIII. Prejudice Against the Robinson-Patman Act by Some Attorneys in the Department of Justice, Antitrust Division

Within the Antitrust Division of the Department of Justice, there is a coterie of lawyers who have expressed animosity to the Clayton Antitrust Law as amended by the Robinson-Patman Act. They formed the nucleus of a group called the "Regulatory Reform Unit" under the aegis of Assistant Attorney General Kauper, to study the various administrative agencies and commissions.

Moreover, without explanation, is the fact that as a part of its regulatory reform program, this so-called "Regulatory Reform Unit" in the Antitrust Division of the Department of Justice surfaced with draft proposals for the repeal of the Robinson-Patman Act which is an amendment to the Clayton Antitrust Act. Why this small group of attorneys in that unit considers a provision of the antitrust laws as a regulation of business is left unexplained. The Robinson-Patman Act is part of the antitrust law and it is not an act to "regulate" business; it is an act to prohibit unfair acts and practices through discrimination in price, service or facilities. Nevertheless, that "Regulatory Reform Unit" during July 1975 caused to be circulated to the Office of Management and Budget (OMB) drafts of bills which would amend or repeal the Robinson-Patman Act for the obvious purpose of having copies of such proposals recirculated to the other Federal departments and agencies.

It appears that this so-called "Regulatory Reform Unit" in the Antitrust Division of the Department of Justice was removed from and without communication with the practical day-to-day operations of business and was without empirical and factual evidence regarding the nature, significance or consequences of the pernicious practice of price discrimination. Therefore, it would, perhaps, be not only correct to describe that "Regulatory Reform Unit" as being in an ivory tower, but also being housed in effect in an isolation booth.

Attorneys in the Antitrust Division of the Department of Justice at different times during 1975 made public speeches and held conferences with representatives of the staffs of certain committees of the Congress for the purpose of assisting in the campaign to have favorably considered these proposals to amend or repeal the Robinson-Patman Act.[1] A few examples may be cited and some excerpts of such speeches are quoted. Thus, Assistant Attorney General Thomas E. Kauper of the Antitrust Division, Department of Justice, in an address he delivered on January 30, 1975, before the National Executive Conference held in Washington, D.C., in part said:

> The Antitrust Division will play a leading role in this effort, both on the legislative front and by participation before regulatory agencies and within the Executive Branch.

[1] Copies of these speeches are in the files of the Ad Hoc Subcommittee.

> Some of the targets are obvious; some are not. * * * The Robinson-Patman Act must be reexamined, to consider modification designed to eliminate those provisions which are affirmatively anticompetitive. * * * Existing antitrust exemptions should be reviewed with a fresh eye, and we are in fact doing that now.
>
> Perhaps the most important single effort of this type is regulatory reform. We are now engaged in what we rather cavalierly call our Regulatory Reform Project, which is designed to study the regulatory activities of the various Federal agencies and the Executive Branch. * * * Finally, we will attempt to isolate specific desirable regulatory goals, and fashion the necessary legislative changes which must be made to blend the statutory mandate and directions of the regulatory agencies to those specific goals in such a way as to eliminate unnecessary and wasteful economic restraints.

On October 29, 1975, the Honorable Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division of the Department of Justice, brought his group's biased views before the particularly suitable audience of the Grocery Manufacturers of America Legal Committee meeting in Washington, D.C. Mr. Rose's remarks, in part, were:

> This is, of course, a particularly suitable audience for my remarks outlining the Administration's concerns about the Robinson-Patman Act. In the course of my talk I should like to discuss some of the possible alternatives for dealing with the problems created by the Robinson-Patman Act to which the Administration has been giving consideration.
>
> As you know, the Robinson-Patman Act was passed in the mid-30's. It was primarily a response to the concern of small grocers that price discounts granted by the members of your industry to the larger chain food stores placed them at a serious competitive disadvantage. Since that time, for some the Act has become, mistakenly in my view, a latter day Bill of Rights for the small businessmen of America. Consequently, very few public officials, particularly Members of Congress, have had any incentive to inquire into the actual economic impact of the Act on both large and small businesses and upon the consumer in today's economy. Nevertheless, the Administration is currently engaged in an effort to do just that. It believes we must go beyond the usual slogans and preconceived ideas for and against changing the current statute. We must determine whether the Robinson-Patman Act has produced any long-run economic benefits and, if so, whether those benefits outweigh the costs.

The Acting Deputy Assistant Attorney General, near the conclusion of his assault against the Robinson-Patman Act, outlined the "Administration Options for Robinson-Patman Act Change," in these words:

> As a result of our study of the justification of the Robinson-Patman Act as it now exists, the Antitrust Division has proposed three possible options for change. The first is to repeal

> the Act outright. The second is to replace the Act with a Predatory Practices Act aimed at making unlawful primary-line predatory acts aimed at driving one's competitors out of business. The last alternative is to reform the Act by incorporating the primary-line provisions of the Predatory Practices Act and additionally providing certain narrow prohibitions against secondary-line discriminations, prohibitions which may be defended by meeting competition and cost justification defenses somewhat more flexible than those contained in the current law.
>
> In my personal view, outright repeal is probably the most intellectually sound and economically defensible approach. I do not believe that Robinson-Patman has had, or will have, any significant economic long-run benefits. * * *
>
> It is apparent that each of these alternatives has its difficulties. Yet, I believe that the enactment of any one of them would be, on balance, of longer run benefit to both the business and consuming public than maintenance of the status quo. The effects of the current Robinson-Patman Act are perverse and often costly to business and consumers alike. I believe all of us must do our share to see that revision or repeal of this expensive piece of antiquity ranks sufficiently high on the national agenda.

This strong advocate for the outright repeal or emasculation of the Robinson-Patman Act—the "Magna Carta of Small Business"—deems that part of the Nation's antitrust laws as an "expensive piece of antiquity," clearly reflects his and the Administration's bias, obliquity, and prejudice against it. To call a law which was enacted in 1936 a "piece of antiquity" is a gross exaggeration and can serve only to stiffen the resistance of that very large part of the American economy who are protected by the antitrust laws against the attempt to repeal or amend the Robinson-Patman Act.

The Honorable Harold B. Tyler, Jr., Deputy Attorney General, Department of Justice, is reported to have asserted as a fact in a public address to the Antitrust Section of the American Bar Association,[2] "That Act clearly discourages price competition."

Needless to say, that assertion as a fact gave the Ad Hoc Subcommittee considerable concern because, among other things, there is no evidence which would seem to establish that as a truth.

Other public statements and speeches against the Robinson-Patman Act were also made by the Honorable Joe Sims, Deputy Assistant Attorney General.

A publicity campaign was also utilized to create opposition to the Act. Thus, the Bureau of National Affairs News and Comments publication, "Antitrust and Trade Regulations," of July 22, 1975, and September 30, 1975, reported an interview with Mr. Sims as follows:[3]

> Sims explained that Justice has never been a strong supporter of Robinson-Patman. President Ford also has called for a revision of the act. Complete repeal of Robinson-Patman Act is an appealing option of some Justice officials, according to Sims, who added that "many people say existing statutes

[2] Hearings, pt. 1, pp. 584–585.
[3] Hearings, pt. 1, pp. 606–607.

> could provide adequate protection against predatory practices." He said Justice and the administration have not selected an option yet. Holding public hearings to gauge sentiment about reforming the act is the possibility under serious consideration, Sims said. In an interview with BNA, Sims said the Justice Department arguments against Robinson-Patman are largely based on logic, anecdotal information and philosophic bias.

To this Chairman Gonzalez interjected: "That is a pretty good word there."

The Bureau of National Affairs publication then continued:

> He said the effects of the 1936 act are almost impossible to quantify. Economic knowledge has become "a little more sophisticated" since the Depression, and price differences between small and large firms are known to be "economically inherent." Sims said Robinson-Patman has raised prices, failed to impede the growth of chain retailers, protected inefficient firms, and encouraged vertical integration by large companies.

Chairman Gonzalez then remarked:

> That is a pretty good package, Mr. Sims. That is why we wrote the letter. We would like to know a little more about that sophisticated economic improvements. Some of us remember the Depression. We lived through the Depression, and we would like to know what the differences are in the sophisticated economic views and if there is such a thing as factual information that you have, evidentiary, that price differences between small and large are inherent, that this act has failed to impede the growth of chain retailers. You are bound to have some evidentiary, or some factual, or some logical reason why you would say that.

During the hearing held by this Ad Hoc Subcommittee on November 19, 1975, Chairman Gonzalez, after making a statement, asked Assistant Attorney General Kauper about the meetings he and Mr. Sims had with staff members of Congressional committees. The record is as follows:[4]

> Mr. GONZALEZ. Mr. Kauper, * * *
>
> However, there is one that I am going to close with, and that has to do with the reported meeting that you and Mr. Sims and others in the U.S. Department of Justice had with various staff members of the Committee on the Judiciary and the Small Business Committee on July 29, 1975.
>
> It is reported that at that time you and other representatives of the Department of Justice presented three proposals regarding the Robinson-Patman Act: (1) To repeal it outright; (2) to substitute, therefore, a predatory pricing statute; or, (3) modify the act in such a way as to remove it from any of its provisions which you argue are anticompetitive.

[4] Hearings, pt. 1, p. 590.

You do have a clear recollection of that conference, do you not?

Mr. KAUPER. Yes; there were members, as I recall, of the House Commerce Committee present, as well, Mr. Chairman.

Although Chairman Gonzalez wrote to officials of the Antitrust Division, Department of Justice, on October 2, 1975, requesting they provide him and his Subcommittee with references to the factual evidentiary material upon which they were basing their views that the Robinson-Patman Act was anticompetitive, they failed to respond to those requests. These letters are as follows: [5]

COMMITTEE ON SMALL BUSINESS,
U.S. HOUSE OF REPRESENTATIVES,
October 2, 1975.

Hon. THOMAS E. KAUPER,
Assistant Attorney General,
U.S. Department of Justice, Washington, D.C.

DEAR MR. KAUPER: Transmitted herewith is a duplicate original of a letter which this day has been directed to the Honorable Harold R. Tyler, Jr., Deputy Attorney General of the United States.

Also, it has been reported that you, in your official capacity, have made statements of fact to the same effect concerning this same subject as the quoted statement attributed to Deputy Attorney General Tyler as set forth in the enclosed letter.

In view of these circumstances, you are requested to submit to this Committee, promptly, the factual evidence you had supporting the statements you have made to which above reference is made. It is emphasized that this request is not for information in the form of statements of philosophy, beliefs, opinions, conclusions or arguments which possibly have been made concerning the propriety of the Robinson-Patman Act as a part of the Federal antitrust laws.

Thanking you in advance for your prompt attention and compliance with this request, I am

Sincerely yours,

HENRY B. GONZALEZ,
Chairman, Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters.

Enclosure.

COMMITTEE ON SMALL BUSINESS,
U.S. HOUSE OF REPRESENTATIVES,
October 2, 1975.

Hon. HAROLD R. TYLER, Jr.,
Deputy Attorney General of the United States Department of Justice, Washington, D.C.

DEAR MR. TYLER: This Committee has determined to commence an investigation, hearings and a review of a number of questions concerning the Robinson-Patman Act and its relation to small business.

As you know, the House Small Business Committee for years has regarded the Robinson-Patman Act as a vital factor in aiding, counseling and assisting small business in order through that means to aid in the preservation of our free competitive enterprise. That view has been held because it has been considered to be not only consistent with, but also in furtherance of the national declared policy set forth in the

[5] Hearings, pt. 1, pp. 584–585.

Small Business Act approved by President Eisenhower on July 18, 1958, a pertinent portion of which is quoted as follows:

"The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiatives and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise." (15 USC 631)

You are advised that in connection with our preparations for investigations and further review of the above subject, it has been noted that you announced your office is preparing a report concerning the Robinson-Patman Act which may contain recommendations for a repeal of the Act. Also, it is reported that in that connection, you asserted as a fact in a public address to the Antitrust Section of the American Bar Association a few weeks ago, "That Act clearly discourages price competition." Assertions of fact to that effect concern this Committee because among other things we have no evidence which would seem to establish such a fact.

In view of these circumstances, if the report to which reference is made is accurate of your assertion of those facts, you are requested to submit to this Committee, promptly, the factual evidence you had supporting the above quoted statement. It is emphasized that this request is not for information in the form of statements of philosophy, beliefs, opinions, conclusions or arguments which possibly have been made concerning the propriety of the Robinson-Patman Act as a part of the Federal antitrust laws.

Thanking you in advance for your prompt attention and compliance with this request, I am

Sincerely yours,

HENRY B. GONZALEZ,
Chairman, Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters.

In other words, it may be repeated that, perhaps, what these Antitrust Division's lawyers had as a basis for their interview is that stated in one sentence of the before quoted interview with Mr. Sims. That particular sentence fully merits reiteration because it so succinctly states their alleged reason; it is requoted and is as follows: "In an interview with BNA, Sims said the Justice Department arguments against Robinson-Patman are largely based on logic, 'anecdotal information and philosophic bias.' "

Notwithstanding that these Department of Justice attorneys lacked empirical and factual evidence upon which they predicated their views, they undertook a novel and rather unusual campaign to propagate and to obtain support for their attempts to repeal or amend the Robinson-Patman Act. This they endeavored to accomplish by the

means of hearings before the Domestic Council as detailed in another chapter of this Report entitled, "*Domestic Council Review Group Hearings on the Robinson-Patman Act.*" [6]

In the meantime they so strongly urged support for their opinions before the professional staff of the Judiciary Committee of the House of Representatives that a member of that staff reduced such argument in writing which together with some other matter was combined in a memorandum which was circulated to Members of that House Committee.

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[6] See Chapter XI of this Report.

Chapter IX. Department of Justice Antitrust Division's Proposals to Repeal or "Reform" the Robinson-Patman Act

A. ATTACKS ON THE ROBINSON-PATMAN ACT

Attack by Sears, Roebuck and Company, Chairman of the Board—Arthur M. Wood

What is the motivation for this investigation in-depth by the Ad Hoc Subcommittee?

It is because of the deep concern of the small business sector and of the Small Business Committee over the serious proposals which have been made to repeal certain portions of the antitrust laws, including the Robinson-Patman Act. Who is behind such proposals? Let one, therefore, look back to April 20, 1975, and recall the National Broadcasting Company's television program entitled "Meet the Press." One of the corporate officers who appeared on that program was Mr. Arthur M. Wood, the Chairman of the Board of Sears, Roebuck and Company, which company is one of the largest buyers of merchandise of all kinds in the world. He alone, on that panel of businessmen, suggested that some of the antitrust laws inhibit free competition today, and in that connection, he stated that he wants to see a review of the Robinson-Patman Act because he alleged that a careful review of the antitrust laws is in order.[1]

Now, why would Sears, Roebuck and Company be calling for such action? Some of those who have investigated the purchasing practices of Sears, Roebuck and of other large buyers of merchandise have reason to believe that they have a clue to the answer to that question.

A clue in that regard was investigated by a Special Investigating Subcommittee of which the late Wright Patman was the Chairman in 1935. At that time, a Court set aside an Order of the Federal Trade Commission which was designed to enjoin Sears, Roebuck from continuing its practice of using its enormous buying power to compel preferential treatment from suppliers of tires. The facts had been established that Sears had, in that regard, secured extremely great preferential treatment not accorded to its competitors. Some of this preferential treatment took the form of large rebates totaling amounts of millions of dollars.

Sears, Roebuck and Company defended its practice as not being violative of the Clayton Antitrust Act, as it was then in effect and before the Clayton Act was amended later, because the law at that time provided for preferential treatment based upon quantity. Of course, Sears, Roebuck was able to and did, in fact, buy merchandise in such very large quantities as were far beyond the reach and ability of other merchants, both large and small, throughout the entire country.

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[1] See the printed record of NBC's program, "Meet the Press," of April 20, 1975, issued by Merkle Press, Inc., Washington, D.C. See also, Hearings, Part 1, pp. 5–6.

The Court [2] agreed with the contention of Sears, Roebuck and set aside the Order of the Federal Trade Commission. Almost immediately thereafter, the Congress enacted the Robinson-Patman Act, thereby amending the Clayton Antitrust Act so as not to permit such preferential treatment and invidious distinctions on the basis of quantity purchased, unless the differential involved in the preferential treatment could be justified on the basis of differences in the cost of manufacture, sale or delivery resulting from the differing methods of quantities in which such commodities are to such purchasers sold or delivered.

Now, since Sears, Roebuck issued its call for a careful review of the antitrust laws, including the Robinson-Patman Act, it has attracted some allies and picked up certain friends who have joined it in efforts to weaken and emasculate the Robinson-Patman Act or even repeal this much-needed law.

B. ATTACK ON ANTITRUST LAWS IN GENERAL

Attack by the Honorable Alan Greenspan

The antitrust laws are a basis for economic freedom and its principles are an American instrument for the promotion and preservation of competition in free markets. With the passage of the Sherman Act in 1890, the United States Congress evinced its determination to eradicate the abuses in the national economy and to provide safeguards for the private free enterprise system.

The importance of economic considerations to the Government was recognized when the Council of Economic Advisers was established in the Executive Office of the President.[3] The Council consists of three members appointed by the President by and with the advice and consent of the Senate. One of the members is designated by the President as Chairman, who is the Honorable Alan Greenspan.

The Council analyzes the national economy and its various segments; advises the President on economic developments; appraises the economic programs and policies of the Federal Government; recommends to the President policies for economic growth and stability; and assists in the preparation of the economic reports of the President to the Congress.

Accordingly, the Ad Hoc Subcommittee decided that Mr. Greenspan would be an eminently important witness, whose testimony could possibly shed some light on the efforts to eliminate an important portion of the antitrust laws. He was invited to appear before the Ad Hoc Subcommittee, but was unavailable to testify.[4]

It appears to be a matter of importance to the subject of the Ad Hoc Subcommittee's investigation that before Mr. Greenspan became Chairman of Council of Economic Advisers, a part of the Executive Office of the President, he rejected as improper the Federal antitrust policy and the antitrust laws. This thesis was advanced by Mr.

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[2] *Goodyear Tire and Rubber Co.* v. *Federal Trade Commission,* 92 F. 2d 677 (C.C.A. 6th, 1937); later reversed on other grounds, *FTC* v. *Goodyear Tire and Rubber Co.,* 304 U.S. 257 (1938).

[3] Employment Act of 1946; 60 Stat. 24; 15 U.S.C. 1023. It now functions under that statute and the Reorganization Plan 9 of 1953.

[4] Hearings, Part 3, pp. 34–35.

Greenspan in a paper given at the Antitrust Seminar of the National Association of Business Economists in 1961.[5] Mr. Greenspan, in part, stated:

> The Sherman Act may be understandable when viewed as a projection of the nineteenth century's fear and economic ignorance. But it is utter nonsense in the context of today's economic knowledge. The seventy additional years of observing industrial development should have taught us something.
>
> If the attempts to justify our antitrust statutes on historical grounds are erroneous and rest on a misinterpretation of history, the attempts to justify them on theoretical grounds come from a still more fundamental misconception.
>
> * * * * *
>
> To sum up: The entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance. It is the product: (a) of a gross misinterpretation of history, and (b) of rather naive, and certainly unrealistic, economic theories." (See "Antitrust" by Alan Greenspan, as compiled by Ayn Rand for publication in a volume entitled "Capitalism, the Unknown Ideal.")

Mr. Alan Greenspan, whose views on antitrust as expressed by him in the paper above quoted, was appointed by the President in 1974 as the Chairman of the Council of Economic Advisers. Prior thereto, he served as a Consultant to that Council from 1970 to the date of his being named as its Chairman.

C. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION'S PROPOSALS

On July 9, 1975, the Department of Justice, Antitrust Division, issued a report on the so-called "Reform of the Robinson-Patman Act."[6] In a hearing of another Subcommitttee of the Small Business Committee,[7] the Honorable Joe Sims, Special Assistant to the Assistant Attorney General, testified that the Antitrust Division has been active on the legislative front and it has been one of the leaders in the movement to review and "* * * reform Federal economic regulation." Mr. Sims then said: "I suppose that rationale would also apply to another legislative effort in which the Antitrust Division has been heavily involved, reform of the Robinson-Patman Act."

(*1*) *First Proposal—Outright Repeal*

The Acting Deputy Assistant Attorney General was before quoted as having said:

> As a result of our study of the justification of the Robinson-Patman Act as it now exists, the Antitrust Division has proposed three possible options for change. The first is to repeal the Act outright. * * *
>
> In my personal view, outright repeal is probably the most

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[5] Mr. Greenspan's paper was read at the Seminar in Cleveland, Ohio, on September 25, 1961. It has been reprinted in a book entitled "Capitalism: The Unknown Ideal," by Ayn Rand and published by Nathaniel Branden Institute, New York, 1962. See Hearings, pt. 3, pp. 35–40.

[6] Noted in Harvard Journal on Legislation, vol. 13, No. 1, Dec. 1975, p. 126.

[7] Subcommittee on Activities of Regulatory Agencies of the House Small Business Committee, June 10, 1975, Hearings, pt. 1, p. 112–113.

intellectually sound and economically defensible approach. I do not believe that Robinson-Patman has had, or will have, any significant economic long-run benefits. * * *"

(2) *Second Proposal—A Proposed Bill entitled Predatory Practices Act*

The second proposed substitute for the Robinson-Patman Act, which was made a part of the record [8] of this investigation, was designated as the "Predatory Practices Act" and is as follows:

PREDATORY PRACTICES ACT

Be it enacted, etc., that this Act shall be known as "The Predatory Practices Act of 1975."

SEC. 2. It shall be unlawful for the seller of a commodity engaged in commerce to overtly threaten a competing or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller; or (b) to cease or refrain from selling any commodity to any particular customer; regardless or whether any overt action is taken to fulfill such threat.

SEC. 3. It shall be unlawful for a seller of a commodity engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supplying the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States.

SEC. 4. It shall be a defense to a violation of section 3 that an otherwise unlawful price:

(a) Was charged by a person in order to meet in good faith an equally low price of a competitor;

(b) Was charged by a new entrant, a person having at the time of sale a less than 10 percent share of the sales of the commodity in the section of the country in which the commodity was sold at such price being deemed a new entrant;

(c) Was charged in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned; or

(d) Did not clearly threaten the elimination from a line of commerce of a competitor of the person charging the otherwise unlawful price.

SEC. 5. As used herein:

(a) "Commerce" shall have the same meaning as in Section 1 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act;

(b) "Price" shall mean the exaction of all consideration diminished by the granting of any brokerage, advertising, promotional, or other allowance, or the furnishing of services or facilities;

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[8] Hearings, Ad Hoc Subcommittee, Nov. 19, 1975, pt. 1, pp. 590–591.

(c) "Economic harm" shall include a reduction of revenues by sales at a price below the direct operational expense incurred in supplying the commodity, destruction of goodwill, and the withdrawal of credit without cause from a person:

(d) "Physical harm" shall include (i) physical damage to or destruction of real property, plants, buildings, equipment or other physical assets of a business enterprise or of those individuals managing, operating, owning or controlling a business enterprise, and (ii) physical injury to or physical intimidation of individuals engaged in managing, operating, owning or controlling a business enterprise;

(e) "Direct operating expense" shall include only direct costs of production and distribution associated with the particular sales of the commodities in question and only the portion of costs of depreciation, capital, leases of land and productive facilities, and general overhead and advertising, the incurring of which vary directly with the quantity of the commodity which is produced; and

(f) "To sell on a sustained basis" shall mean to sell the commodity in question for more than 60 days within a period of one year.

SEC. 6. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than one year, or both.

SEC. 7. This Act shall be considered one of the "antitrust laws" for the purposes of Section 1 of the Act of October 15, 1914 (38 Stat. 730). Provided, however, that this Act shall not be construed to limit the applicability of such antitrust laws.

SEC. 8. Section 5 of the Federal Trade Commission Act shall not be held to prohibit any discrimination in price for the sale of commodities, or the receipt of any such discrimination.

SEC. 9. Section 2 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act, as amended, and Sections 1 and 3 of the Act of June 19, 1936 (49 Stat. 1528) commonly known as the Robinson-Patman Act, are hereby repealed. Any orders or decrees entered pursuant to the sections enumerated in the preceding sentence shall expire two years after the enactment of this Act, or sooner if they so provide.

SEC. 10. The Federal Trade Commission is hereby empowered to enforce the provisions of this Act as if they were provisions of the Act of October 15, 1914 (38 Stat. 730).

(3) Third Proposal—"Robinson-Patman Act Reform Statute"

The third proposal, called by its draftsmen "Robinson-Patman Act Reform Statute," also has been made a part of this Ad Hoc Subcommittee's record;[9] it is as follows:

ROBINSON-PATMAN ACT REFORM STATUTE

(* Denotes sections contained in Predatory Practices Act)

Be it enacted, etc., that this Act shall be known as "Price Discrimination Act of 1975."

*Section 2. It shall be unlawful for the seller of a commodity engaged in commerce to overtly threaten a competing

[9] Hearings, Part 1, pp. 591–593.

or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller or (b) to cease or refrain from selling any commodity within a geographic area or to cease or refrain from selling any commodity to any particular customer; regardless of whether any overt action is taken to fulfill such threat.

*Section 3. It shall be unlawful of a seller of a commodity, engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supplying the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States.

* Section 4. It shall be a defense to a violation of Section 3 that an otherwise unlawful price:

(a) was charged by a person in order to meet in good faith an equally low price of a competitor;

(b) was charged by a new entrant, a person having at the time of sale a less than 10 percent share of the sales or the commodity in the section of the country in which the commodity was sold at such price being deemed a new entrant;

(c) was charged in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned; or

(d) did not clearly threaten the elimination from a line of commerce of a competitor of the person charging the otherwise unlawful price.

Section 5. It shall be unlawful to discriminate either directly or indirectly in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where:

(a) the recipient of the discrimination is in competition with others not granted the discrimination, the discrimination is significant in amount, and the discrimination is part of a pattern which systematically favors larger recipients in the relevant line of commerce over their smaller competitors; or

(b) the recipient of the discrimination is in competition with others not granted the discrimination, the discrimination is significant in amount, and the discrimination clearly threatens to eliminate from a line of com-

merce one or more competitors of the recipient where the effect of such elimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

Section 6. It shall be a defense to a violation of Section 5 that the lesser price was charged in good faith to meet an equally low price of a competitor. Except in a suit seeking only prospective relief against all or substantially all of the competitors practicing the discrimination, the defense shall be allowed even if the equally low exaction of a competitor is subsequently determined to be unlawful.

Section 7. It shall be a defense to a violation of Section 5 that the lesser price makes an appropriate allowance for differences in the cost of manufacture, distribution, sale, or delivery resulting from the differing methods or quantities involved in supplying the customers in question. An allowance is appropriate where the difference in price does no more than approximate the difference in cost; where the difference in price does not exceed a reasonable estimate of the difference in cost; or where the estimated difference in cost is the result of a reasonable system of classifying transactions which is based on characteristics affecting cost of manufacture, distribution, sale or delivery, under which differences in price among classes approximate differences in cost.

Section 8. It shall be a defense to a violation of Section 5 that: (i) the lesser price was in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned; or (ii) the lesser price was available, on reasonably practicable conditions, to the person allegedly discriminated against.

Section 9. Nothing herein contained shall prevent any person from refusing to deal with any person. An offer to deal only on discriminatory terms shall, however, be treated as a completed transaction for the purpose of according relief under this Act.

*Section 10. Section 5 of the Federal Trade Commission Act shall not be held to prohibit any discrimination in price for the sale of commodities, or the receipt of any such discrimination.

Section 11. An order or injunction issued to restrain or prohibit a violation of Sections 5 through 9 shall remain in effect for a limited time, stipulated at the time of entry, and reasonably related to the nature of the violation. In no case shall an order issued to enforce such sections remain in effect more than five years after the date of entry.

*Section 12. Section 2 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act, as amended, and Sections 1 and 3 of the Act of June 19, 1936 (49 Stat.

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1528) commonly known as the Robinson-Patman Act, are hereby repealed. Any orders or decrees entered pursuant to the sections enumerated in the proceeding sentence shall expire two years after the enactment of this Act, or sooner if they so provide.

*Section 13. As used herein:

(a) "Commerce" shall have the same meaning as in Section 1 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act;

(b) "Price" shall mean the exaction of all consideration diminished by the granting of any brokerage, advertising, promotional, or other allowance, or the furnishing of services or facilities;

(c) "Economic harm" shall include a reduction of revenue by sales at a price below the direct operating expense incurred in supplying the commodity, destruction of goodwill, or the withdrawal of credit without cause from a person;

(d) "Physical harm" shall include (i) physical damage to or destruction of real property, plants, buildings, equipment or other physical assets of a business enterprise or of those individuals managing, operating, owning or controlling a business enterprise, and (ii) physical injury to or physical intimidation of individuals engaged in managing, operating, owning or controlling a business enterprise;

(e) "Direct operating expense" shall include only direct costs of production and distribution associated with the particular sales of the commodities in question and only the portion of costs of depreciation, capital, leases of land and productive facilities, and general overhead of advertising, the incurring of which vary directly with the quantity of the commodity which is produced; and

(f) "to sell on a sustained basis" shall mean to sell the commodity in question for more than 60 days within a period of one year.

*Section 14. This Act shall be considered one of the "antitrust laws" for the purposes of Section 1 of the Act of October 15, 1914 (38 Stat. 730). Provided however, that this Act shall not be construed to limit the applicability of such antitrust laws.

*Section 15. Any person violating Sections 2 or 3 of this Act shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than one year, or both.

*Section 16. The Federal Trade Commission is hereby empowered to enforce the provisions of this Act as if they were provisions of the Act of October 15, 1914 (38 Stat. 730).

Chapter X. Analysis of Proposals Made by the Antitrust Division, Department of Justice, to Repeal or "Reform" the Robinson-Patman Act*

A. IN GENERAL

The recent attempts made by the Antitrust Division of the Department of Justice to discredit and eviscerate the Robinson-Patman Act through the medium of either the suggested "Predatory Practices Act" or the suggested so-called "Robinson-Patman Reform Statute" would, in effect, repeal this law. Either of these two proposed statutory alternatives would be tantamount to an effective nullification of the Robinson-Patman Act's salient provisions.

B. PREDATORY PRACTICES

Sections 2, 3 and 4 of the proposed "Predatory Practices Act" are the same as Sections 2, 3 and 4 of the proposed "Robinson-Patman Act Reform Statute" and relate to certain specified predatory practices and defenses. Under these proposals, a violation of the predatory practice prohibitions is a misdemeanor which subjects the violator to a fine not to exceed $100,000 or imprisonment not to exceed one year, or both.

Section 2 of the two draft bills makes it unlawful for the seller of a commodity to overtly threaten a competing seller with economic or physical harm with a view toward causing or inducing the competitor to conform to particular pricing policies, or to cease selling within a particular geographic market or to a particular customer. The types of practices at which Section 2 is directed have no apparent relationship to discriminatory pricing practices. If this activity is not already covered by the Sherman Act's prohibitions or some non-antitrust criminal provision, it should be considered within the context of an amendment to the Sherman Act and not the Robinson-Patman Act.

In contrast to proposed Section 2, Section 3 is in the nature of a predatory price discrimination provision, focusing on primary level anticompetitive behavior. It should be noted that Section 3 prohibits a seller from selling on a sustained basis a commodity at a price lower than the reasonably anticipated average direct operating expense incurred in supplying the commodity. "[T]o sell on a sustained basis" is defined to mean to sell the commodity for more than 60 days within a period of one year. In addition, the term "direct operating expense" includes only direct costs of production and distribution associated with the particular sales of commodities, and only those portions of costs of depreciation, capital, leases of land and production facilities and general overhead and advertising which vary directly with the quantity of the commodity which is produced. Significantly, Section 3

*See Hearings, pt. 1, beginning at page 222 *et seq.*

appears to be a *per se* provision closely allied with Section 2 of the Sherman Act.[1]

Section 4 of the proposed statutes provides various defenses to a violation of Section 3, including: (1) a meeting competition defense; (2) a new entrant defense—"new entrant" being defined as a seller with less than a 10% market share of the commodity in the section of the country where the commodity was sold at the low price; (3) a "changing conditions" defense, where the price charged was in response to changed conditions affecting the market for or the marketability of the commodity involved; and (4) a defense that the unlawful price did not clearly threaten to eliminate from a line of commerce a competitor of the person charging the otherwise unlawful price. Thus, any adverse effect upon competition which is less than a "clear threat" of total elimination of a competitor would not violate Section 3.

The tentative predatory practices provisions, whether viewed alone as a separate proposal or as incorporated as part of the proposed Robinson-Patman Act Reform Statute, are clearly designed to negate certain primary level predatory intent cases decided under the Robinson-Patman Act. In one of these cases, *Utah Pie Co.* v. *Continental Baking Co.*,[2] the Supreme Court took a liberalized approach in permitting juries to infer predatory intent in primary level competition cases under Section 2(a). Despite the existence of a highly competitive market, Utah Pie's substantial market position in the market involved, and the ability of Utah Pie to make a profit, the Court held that there was evidence of predatory tactics, below cost sales and radical price cuts by three competing sellers—from which predatory intent could be inferred.[3] The draft predatory practice bill would cover only the most egregious practices, which in all likelihood are already prohibited by Section 2 of the Sherman Act. Such a myopic view of predatory practices is at odds with the Clayton Act and, more specifically, the Robinson-Patman Act amendments, which are designed to stop such activities before they reach the aggravated state of Sherman Act application.

The predatory price discrimination application of Robinson-Patman reaches those practices which are beyond the scope of the Sherman Act. The proposed revision would emasculate Robinson-Patman in this respect. However, no one has articulated a sound basis for radically limiting the Act's primary line competition reach.

Significantly, the proponents of "reform" urge that the Predatory Practices Act alone is the only price discrimination legislation that is needed. There is no need to reiterate that such an alternative would place one back in the 1920's and 1930's, when original Section 2 of the Clayton Act appeared to proscribe price discrimination only where the adverse effects of such discrimination took place on the level of competition of the supplier granting the discriminatory price—the primary level or line.[4] Although the Supreme Court rejected the nar-

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[1] See *International Air Industries, Inc.* v. *American Excelsior Co.*, 1975–2 Trade Cas. ¶ 60,447 (5th Cir. 1975); Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 *Harv. L. Rev.* 697 (1975).

[2] 386 U.S. 685 (1967), *on remand*, 396 F. 2d 161 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968).

[3] *Id.* at 702–03.

[4] See, e.g., *National Biscuit Co.* v. *FTC*, 299 Fed. 733 (2d Cir. 1924); *Mennen Co.* v. *FTC*, 288 Fed. 774 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923).

row interpretation that original Section 2 was limited to prohibiting only discriminatory pricing which injured competitors of the discriminating party,[5] original Section 2, by its terms, was not broad enough to affect the significant competitive advantages of the large chains. The proposal to substitute the Predatory Practices Act for the Robinson-Patman Act would return to the original Section 2 of the Clayton Act with all of its defects.

C. CUSTOMER LEVEL COMPETITION

The current proponents of reform believe in hedging their bets. If outright repeal is unacceptable or if substitution of the Predatory Practices Act for Robinson-Patman is unacceptable, there is a third alternative which incorporates the Predatory Practices Act provisions—and more. Section 5 of the proposed "Robinson-Patman Act Reform Statute" is designed to replace Section 2(a) of the Robinson-Patman Act. In order to violate Section 5(a) of this latter proposed bill, the discrimination must be "significant in amount," and "part of a pattern which systematically favors larger recipients . . . over their smaller competitors. . . ." Alternatively, Section 5(b) provides that a cognizable price discrimination must be significant in amount and must "clearly threaten" the elimination of one or more competitors of the favored recipient, where the effect of such elimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce. A violation of either Section 5(a) or 5(b) does not occur unless there are competitors of the recipient of the discrimination who did not receive favored treatment. There is no mention of customers beyond the "recipient" level of competition.

Most Robinson-Patman Act cases have involved price discrimination where competitive injury is alleged to have taken place at the customer or secondary level of competition. In *FTC* v. *Morton Salt Co.*,[6] the Supreme Court analyzed the competitive injury requirement of the Robinson-Patman Act in a secondary line case:

> Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had "been too restrictive, in requiring a showing of general inquiry to competitive conditions. . . ." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."

The court emphasized that rather than requiring proof that the discriminations in fact harmed competition, it was enough that there was a reasonable possibility that they may have had such an effect.[7] The competitive injury approach reflected in *Morton Salt*, *supra*, has

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[5] *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245 (1929).
[6] 334 U.S. 37, 49 (1948).
[7] 334 U.S. 37, 46 (1948); see *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726, 742 (1945).

been the subject of extensive litigation involving the propriety of relying on this approach in certain factual settings.[8]

Until the Supreme Court resolved the matter in *Perkins* v. *Standard Oil Co.*,[9] it was accepted that present Section 2(a)'s competitive effects language limited its application to three levels of competition: seller (or primary) level, customer (or secondary level), or customer of a customer (or third) level. In *Perkins*, the Court, relying in part on its previous holding in *FTC* v. *Fred Meyer, Inc.*,[10] noted that it would defeat the purpose of the Act to construe "customer" narrowly and held that the Act applied despite the existence of another distributional link which placed the situation beyond the third level of competition. In the face of the sound body of case law which has developed in this area, the proposed revision is either too restrictive, or if not intended so, is too vague.

D. PROPOSED MODIFICATIONS IN DEFENSES

Section 6 of the proposed Robinson-Patman Act Reform Statute creates a good faith meeting competition defense to an alleged violation of Section 5. The defense would be available under limited circumstances even if it were deemed that the price being met was unlawful. Section 7 of the proposed Act provides for a cost justification defense. This provision offers greater flexibility in approximating (including resort to "reasonable estimates") the cost savings to justify discriminatory prices. Section 8 of the proposed Act provides for a changing market conditions defense to a Section 5 violation.

E. MEETING COMPETITION

There is no need to alter the meeting competition defenses as it has emerged over the years under the Robinson-Patman Act. Decisions construing the meeting competition defense have recognized business realities by giving pre-eminence to the "good faith" aspects of competitive responses.[11] Thus, the defense has over the years taken on a new vitality and has emerged as a significant factor in developing compliance programs under the Robinson-Patman Act.

In the past, the Trade Commission and the courts have taken the position that the meeting competition defense applies only to specific competitive situations and cannot be employed to justify a pricing system or program.[12] However, in *Callaway Mills Co.* v. *FTC*,[13] the Fifth Circuit Court of Appeals reversed an FTC action against a respondent's "systems" competitive response, noting that there was no other workable business alternative available to the respondent. The court in *Callaway* concluded that "[i]t is only when no 'reasonable and prudent person' would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned."[14]

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[8] ABA, Antitrust Developments, 116–122 (1975).
[9] 395 U.S. 642 (1969).
[10] 390 U.S. 341 (1968).
[11] *Kroger* v. *FTC*, 438 F. 2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).
[12] *FTC* v. *A. E. Stanley Mfg. Co.*, 324 U.S. 746 (1945).
[13] 362 F. 2d 435 (5th Cir. 1965).
[14] *Id.* at 442.

F. ELIMINATION OF BROKERAGE AND PROMOTIONAL ALLOWANCE PROVISIONS (AD HOC SUBCOMMITTEE ADOPTS HON. EARL W. KINTNER'S ANALYSIS)

The proposed Robinson-Patman Act Reform Statute does not contain any provisions equivalent to Section 2(c), 2(d) and 2(e) of the Robinson-Patman Act. Nevertheless, there does appear to be an attempt to get at these indirect discriminations by the proposed Act's definition of "price." Under Section 13(b) of the proposed Act, "price" is defined as "the exaction of all consideration diminished by the granting of any brokerage, advertising, promotional, or other allowance, or the furnishing of services or facilities." However, this approach to curbing objectionable brokerage and promotional allowance practices falls woefully short of avoiding the significant anticompetitive consequences that can result from these practices.

The necessity for statutory references equivalent to Sections 2(c), 2(d) and 2(e) is made apparent by the Supreme Court cases interpreting these provisions. For example, in *FTC* v. *Henry Broch & Co.*, the Court interpreted Section 2(c) of the Act as prohibiting the splitting of commission fees between a seller's independent broker and a buyer. [15] Previously, the Court had noted that Section 2(c)'s prohibition against brokerage payments was absolute, requiring no showing of competitive injury.[16] The Court, in *Broch*, held that Section 2(c)'s reference to "any person" included an independent seller's broker. Predicating its conclusion on the broad purpose Congress intended to achieve through Section 2(c), the Court noted: [17]

> The Robinson-Patman Act enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining and indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. . . . This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence, but all other means by which brokerage could be used to effect price discrimination."

In *Broch*, the Court indicated that a reduction in brokerage which is passed on in the form of a reduced price to a buyer does not necessarily violate Section 2(c) as a discount in lieu of brokerage.[18] The *Broch* decision reflects a realistic appraisal of the evil at which Section 2(c) was aimed and an interpretation of the provision which is not too rigid.

For quite some time, Sections 2(d) and 2(e) of the Act, dealing with discriminatory promotional allowances, payments, services and

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[15] 363 U.S. 166 (1960).
[16] *Federal Trade Comm.* v. *Simplicity Pattern Co.*, 360 U.S. 55, 64–65 (1959).
[17] 363 U.S. 166, 168–169 (1960).
[18] *Id.* at 175–176. See *Thomasville Chair Co.* v. *FTC*, 306 F. 2d 541 (5th Cir. 1962), on remand, Memorandum Accompanying Final Order, 63 F.T.C. 1048 (1963).

facilities, were interpreted as requiring sellers to provide such allowances only to those customers who purchased directly from the seller.[19] Thus, retailers purchasing through wholesalers or other intermediaries were not entitled to proportionally equal treatment with respect to promotional allowances, except when they were treated as customers under the indirect purchaser doctrine.[20] In *FTC* v. *Fred Meyer, Inc.*, the Supreme Court held that, under Section 2(d), retailers purchasing through wholesalers were entitled to receive from a seller promotional payments on proportionally equal terms as did direct-buying customers with whom they competed.[21] The Court, after extensive review of the relevant legislative history, noted that a contrary result:[22]

> . . . would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. If we were to read "customer" as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of § 2(d).

The Federal Trade Commission reacted to the *Meyer* decision by revising its promotional allowance Guides relating to Sections 2(d) and 2(e), and redefined "customer" to include purchasers who purchased the seller's product through wholesalers or other intermediaries.[23]

Thus, as was the case in 1936, there are sound reasons for retaining the *per se* prohibitions against illicit brokerage and discriminatory promotional payments, services or facilities.[24] These provisions are designed to plug the loophole of indirect price discrimination through disguised price concessions in the form of "dummy" brokerage payments[25] or pseudo-advertising allowances,[26] and should be retained.

G. LEGAL EXPERTS OPPOSE REPEAL OF THE ROBINSON-PATMAN ACT

Among the very many legal experts who oppose the repeal or the emasculation of the Robinson-Patman Act and reject the proposals submitted by the Department of Justice, Antitrust Division, the following are the views of some:

(1) Jerrold G. Van Cise, Esquire

Jerrold G. Van Cise, Esquire, who is an acknowledged legal expert in antitrust law, opposes the repeal of the Robinson-Patman Act and he urged that the so-called "Robinson-Patman Act Reform Statute should not be adopted."[27] He is an eminently respected attorney and author of a number of scholarly books on antitrust law, practice, and procedure, monographs and articles in law journals on this important branch of the law. He had served as the Chairman of the American

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[19] FTC, "Guides for Advertising Allowances and Other Merchandising Payments and Services," Guide 2 (May 19, 1960).
[20] *American News Co.* v. *FTC*, 300 F. 2d 104, 109 (2nd Cir.), *cert. denied*, 371 U.S. 824 (1962).
[21] 390 U.S. 341 (1968).
[22] *Id.* at 352.
[23] 16 C.F.R. § 240.3 (1974).
[24] H. Rept. No. 2951 (74th Cong. 2d Sess. 1936) at pp. 7–8.
[25] H. Rept. No. 2287 (74th Cong. 2d Sess. 1936) at pp. 14–15.
[26] *Id.* at 15–16.
[27] Hearings, pt. 2, p. 215.

Bar Association Antitrust Section, as well as having also been the Chairman of the antitrust section of the New York State Bar Association.

In respect to the proposed so-called "reform" of the Robinson-Patman Act, which proposal would completely eliminate the ban on territorial discrimination where it may be an incipient violation of the Sherman Act, Mr. Van Cise viewed that as an act which would increase concentration. This authority on antitrust said: [28]

> It should be called the Industrial Concentration Act which will mean the trend toward big two's and big three's in the major industries will be accelerated. (Emphasis supplied)

(*2*) *Honorable Earl W. Kintner*

The Honorable Earl W. Kintner, a former Chairman of the Federal Trade Commission who was appointed to this high post by President Eisenhower, concluded his testimony with these words: [28a]

> I want to conclude by emphasizing that, as a whole, I believe that it would be a grave mistake to make wholesale amendments to or substantially repeal the Robinson-Patman Act. The statute as written is a shining example of our Government's concern for small businesses, and for the maintenance of basic business morality and competition.
>
> The Robinson-Patman Act is most assuredly not an anachronism that needs to go the way of fair trade legislation. It is a vital and effective piece of legislation that, when properly understood, deserves and receives the support of consumers and businessmen through this great land of ours.

(*3*) *Basil J. Mezines, Esquire*

Another knowledgeable opponent of repeal is Basil J. Mezines, Esquire, a former Executive Director of the Federal Trade Commission, and Counsel for the Automotive Warehouse Distributors Association.[29] In his prepared statement to the Ad Hoc Subcommittee, Mr. Mezines, in part, stated:

> At this time it would serve no purpose to modify or review the Robinson-Patman Act. The proposals I have examined which purport to "reform" this legislation would simply weaken its provisions. I believe that this would be a serious mistake. The Robinson-Patman Act is a vital, effective piece of legislation that is relied upon by businessmen to insure equality of opportunity in the marketplace. The members of AWDA are satisfied that this statute has resulted in the orderly marketing of goods and provides a basis for small as well as large businessmen to compete in the marketplace. Before any attempts are made to repeal or weaken the Act, the burden should be upon the critics to submit to this Committee hard evidence showing where the statute has failed. This has not been done to date.

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[28] Hearings, pt. 2, page 219.
[28a] Hearings, pt. 1, p. 236.
[29] Hearings, pt. 2, pp. 2–26.

(4) Honorable Ernest G. Barnes

The Assistant Chief Administrative Law Judge of the Federal Trade Commission, the Honorable Ernest G. Barnes, who opposes any repeal of the Robinson-Patman Act, summarized the reasons for this view thus: [30]

> In sum, the proposed legislation, which is offered as a substitute or reform for existing legislation, would effectively repeal the Robinson-Patman Act and leave the Nation without a price discrimination statute. In fact, both proposed statutes specifically provide that the Federal Trade Commission cannot proceed against a discrimination under section 5 of the Federal Trade Commission Act as an unfair method of competition.

(5) Eugene A. Higgins, Esquire

Among the witnesses heard by the Ad Hoc Subcommittee was Eugene A. Higgins, Esquire, a Federal career attorney with the Federal Trade Commission's Bureau of Competition. During his testimony, he said: [31]

> In general terms, I agree with the conclusion of Mr. James Halverson, former Director of the Bureau of Competition. In his March 16, 1975, memo, Mr. Halverson was commenting on prior versions of the proposals, but his comments appear appropriate to the present proposals: "One, that the Justice Department's proposals are one-sided and not based upon empirical analysis; two, that they are founded in certain respects on questionable economic theory; and three, that they appear to be largely unworkable from an enforcement viewpoint."

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[30] Hearings, pt. 2, p. 173.
[31] Hearings, pt. 2, p. 176.

Chapter XI. Domestic Council Review Group Hearings on the Robinson-Patman Act

It has been know for a number of years that a small group in the Antitrust Division of the Department of Justice have held views prejudical to the Clayton Antitrust Act as amended by the Robinson-Patman Act. That antagonism has continued to grow as the years have passed. Recently, during the administration of President Nixon there was formed in the Antitrust Division of the Department of Justice, under the supervision of the Assistant Attorney General Thomas H. Kauper, a unit known as "Regulatory Reform Unit." Ostensibly it was the purpose of this body to study and provide suggestions for reform of regulatory activities in the Federal Government so as to reduce the volume of regulations which are applicable to business enterprises and directed its attention almost entirely to the activities of the so-called independent regulatory commissions.

The question may be asked why did this "Regulatory Reform Unit" not also direct its attention to the reform regulations promulgated by the various departments and bureaus in the Executive Branch of the Government in the same proportion as it directed its attention toward the independent regulatory agencies.

It is now clear from the record of the hearings held by this Subcommittee that shortly after it was established, officials of the Antitrust Division of the Department of Justice arranged with staff members of the Domestic Council, Executive Office of the President, to secure support for proposals to repeal or "reform" the Robinson-Patman Act.

On November 26, 1975, the Federal Register[1] published a notice that the Domestic Council Review Group on Regulatory Reform will hold hearings on the Robinson-Patman Act. That notice is as follows:

NOTICE OF DOMESTIC COUNCIL REVIEW GROUP HEARINGS ON THE ROBINSON-PATMAN ACT

> Notice is hereby given that the Domestic Council Review Group On Regulatory Reform will hold public hearings on the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a, 13b and 21a, on December 8, 9, and 10, 1975. The purpose of these hearings is to obtain the views of expert, industry, and consumer witnesses on the need for the Robinson-Patman Act or similar statutes dealing with price discrimination in sales among businesses, and whether the public interest would be served by the repeal, modification or retention of the Act. The record of these proceedings will be used by the Domestic Council Review Group as part of the basis for any recommendations to the President with respect to the formulation of legislative

[1] Federal Register, Vol. 40, No. 229, pp. 54855–54856.

proposals regarding the Robinson-Patman Act for transmittal to the Congress.

The dates and places of the hearings are:

Monday, December 8, 1975—Conference Room B, Departmental Auditorium, Constitution Avenue, N.W., between 12th and 14th Streets, Washington, D.C.—10 a.m. to 5 p.m.

Tuesday, December 9, 1975—Room 2008, New Executive Office Building, Pennsylvania Avenue and 17th Streets, N.W., Washington, D.C.—10 a.m. to 5 p.m.

Wednesday, December 10, 1975.—Conference Room B, Departmental Auditorium, Constitution Avenue, N.W., between 12th and 14th Streets, Washington, D.C.—10 a.m. to conclusion.

For further information, contact Mr. Donald Flexner, Antitrust Division, U.S. Department of Justice, Washington, D.C. 20530, 202/739–2950.

PAUL C. LEACH,
Associate Director Domestic Council.

A. THE DOMESTIC COUNCIL

The Domestic Council was established in the Executive Office of the President pursuant to Reorganization Plan No. 2 of 1970, effective July 1, 1970. The duties of the Council are prescribed by Executive Order 11541 of that date, and further elaborated upon by the President's Memorandum for Members of the Council February 13, 1975.[2] The Domestic Council is a Cabinet group and to a considerable degree would be a domestic counterpart to the National Security Council.

The membership of the Domestic Council outlined in the Plan consisted of the following:

The President of the United States
The Vice President of the United States
The Attorney General
The Secretary of Agriculture
The Secretary of Commerce
The Secretary of Health, Education and Welfare
The Secretary of Housing and Urban Development
The Secretary of the Interior
The Secretary of Labor
The Secretary of Transportation
The Secretary of the Treasury
. . . and such other officers of the Executive Branch as the President may from time to time direct.

The staff of the Council was to be headed by an Executive Director who ". . . shall be an assistant to the President designated by the President . . ." and who shall perform such functions as the President may from time to time direct.[3]

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[2] Presidential Documents, February 17, 1975 : 191–193.

[3] The plan and accompanying Presidential Message were printed in a House Government Operations Committee Report; "Disapproving Reorganization Plan 2 of 1970" (H. Rept. No. 91–1066).

Ken Cole, until recently the Executive Director of the Council, noted that in the years 1973 and 1974 the Council met infrequently. In an interview, he explained how the Council worked:

> The Council operates in committee form where we take six or seven guys, who are focused on one of the issues that we are looking at and have a good productive session. You can't have a working session with 19 people. It just doesn't happen. In the course of the four years we have been in business we have had only about 15 full Council meetings and they have been primarily show-and-tell type sessions. But the committees meet regularly.[4]

In the short life of the Domestic Council, it has changed roles a number of times with continuing debate over how it should be structured, to whom it should be responsible and responsive, and for what ends it should strive.

B. COUNCIL'S REVIEW GROUP INTERVENTION

Hugh Heclo, in an article [5] entitled, "OMB and the Presidency—The Problem of 'Neutral Competence'" made these comments:

> As to the recommended use of the Domestic Council to examine and coordinate policy proposals, the important question concerns the *criteria* according to which the Council will conduct these operations. If its main focus is to be the analysis of the pros and cons of substantive issues, then it is doing what OMB ought to do in evaluating the connection between expenditure and policy. Moreover, the Council does not "own" a process of evaluation comparable OMB's institutional role in budgeting. Lacking control over a process, the Council necessarily finds it difficult to be needed by the departments and thus to acquire information. It also lacks any routine requiring continuing involvement rather than *ad hoc* intervention. Claiming to speak from an office close to the President is not enough.

Thus, the learned author of that article comes to the conclusion that because the Domestic Council is "lacking control over a process" it "necessarily finds it difficult to be needed by the departments and thus to acquire information." That being true, one can rightfully inquire why did the Domestic Council Review Group interject itself into this matter? What motivated the present officials of the Antitrust Division of the Department of Justice to have this group of the Domestic Council hold hearings in the light of the observations made by Hugh Heclo in the before quoted monograph?

The Assistant Attorney General in charge of the Antitrust Division, in testifying before this Ad Hoc Subcommittee, said: [6]

> Mr. KAUPER. We are working with the Domestic Council staff on how the hearings will be run, the possible witnesses—

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[4] Robert T. Gray, Little Known "Brokers" Behind Presidential Programs, Nation's business, May 1974, p. 24.
[5] The Public Interest, No. 38, Winter 1975, p. 96.
[6] Hearings, pt. 1, p. 615.

that is all being done jointly, in the hope of getting the best cross section we can get. We are playing a role in that.

I should add that, in light of your comments, I think that the one thing that cannot be said about the proposals we have advanced is that they have been done in secret, that they have been done in some nefarious fashion. The draft proposals, as soon as we had them, were made available up here on the Hill. They have been circulated; we are holding hearings. So it seems to me, Mr. Chairman, that it is a remarkably open proceeding.

I grant you that that may depend a bit on who we have at the hearings, and how balanced those hearings are. It is my expectation they will be very balanced hearings. That certainly is our goal.

Chairman GONZALEZ. What would you say, though, would be your input? Suppose you suggest or give us a list of prospective invitees. Will it be superseded, will it be overruled, or will it have a very definite acceptance? Who will, in effect, have the veto power over whatever suggestions you may have?

Mr. KAUPER. It is being done through the Domestic Council. I do not know who would have a veto power. I would assume lists we submit, possible witnesses, will be given considerable weight. I do not think I could say we are running the hearings. I do not know if I can answer any more specifically on that, Mr. Chairman.

Chairman GONZALEZ. At this time, are you familiar with the composition of the Domestic Council, who exactly constitutes a Domestic Council?

Mr. KAUPER. Mr. Cannon is the chairman of the Domestic Council. This is done, in part, through their review group on regulatory reform, which involves Mr. Schmults, Deputy Counsel to the President; Mr. MacAvoy of the Council of Economic Advisers, and some others.

Special attention is invited to the *full name* of this Domestic Council's group; it is "Domestic Council Review Group on *Regulatory Reform*" (emphasis added). Why "Regulatory Reform" in connection with antitrust laws or specifically with the Robinson-Patman Act? It is submitted that this would appear to constitute deliberate confusion because when one speaks of "regulations," it should not be equated with basic or fundamental laws. *The antitrust laws, of which the Robinson-Patman Act is a part, impose NO REGULATIONS on business.* The antitrust statutes merely require that business, that is the sellers and the buyers, avoid acts and practices which restrain trade, injure, damage, or destroy small business, and otherwise substantially lessen competition and tend to create a monopoly. Calling one thing by a different name cannot change the true character of that thing.

When the Honorable Paul Rand Dixon was Chairman of the Federal Trade Commission, in an address he delivered, he made this observation:[7]

> "Regulation," as the term is usually understood, means supervisory control by an administrative body that substi-

[7] Speech delivered on Oct. 24, 1974, before the 62d Annual Meetings of the American Life Convention, Dallas, Texas.

> tutes for the impersonal control of the free market. The provisions of the Sherman, Clayton, and Federal Trade Commission Acts on the other hand, relating to certain business practices such as mergers, price discrimination, and unfair and deceptive methods of competition, are prohibitions designed to preserve a free market and make it function effectively. They are not "regulation."

Intellectual honesty is needed, especially from important Governmental officials. The Robinson-Patman Act is a basic law which has been on the statute books of this Country since 1936; it requires no paperwork whatsoever, no rules nor regulations to implement it, no additional bookkeeping, nor does it require onerous and burdensome obligations on the part of the already over-harassed small businessman. The aim of the Robinson-Patman Act is to protect people in commerce and business from discriminatory and unfair pricing practices.[8] The Robinson-Patman Act as part of the Clayton Antitrust Act is in the United States Code and is NOT a regulation such as are promulgated by Federal departments and agencies which regulations may be found in the Code of Federal Regulations. The Robinson-Patman Act, as passed by the Congress and signed into law by the President, is in reality, small business' last hope for economic survival.

C. REVIEW GROUP'S HEARINGS

The Domestic Council Review Group on Regulatory Reform held its hearings on December 8, 9, and 10, 1975 as scheduled. The notice as published in the Federal Register stated in part that "The purpose of these hearings is to obtain the views * * * on the need for the Robinson-Patman Act * * * and whether the public interest would be served by the repeal, modification, or retention of the Act." The notice directed those seeking further information to contact Mr. Donald Flexner, Antitrust Division, Department of Justice, since these hearings of the Review Group on Regulatory Reform were held under their aegis.

According to information, the initial witnesses that were selected and who later testified were known to be against the Robinson-Patman Act. Professor Donald I. Baker, of the Cornell Law School, in beginning his testimony, said

> "I strongly believe that now is the time to do something about Robinson-Patman Act, and I strongly urge the Administration to do it. Legislation should be based on today's needs, not yesterday's fears."

Toward the conclusion of his testimony, Professor Baker used this hyperbole:

> "In other words, the fact that the Robinson-Patman Act provides a full employment program for antitrust lawyers and professors—and provides comic relief for law students—does not necessarily mean that the public is well served."

In order that the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters would have as fair, balanced, and

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[8] See Chapter V "The Robinson-Patman Act" and an Analysis of its Provisions," of this report.

objective hearings as possible, every effort was made to have Professor Baker appear and testify before it as can be clearly seen from record of printed hearings of the proceedings.[9] The Ad Hoc Subcommittee regrets his inability to testify before it.

The Honorable Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice, did not present a formal prepared statement, but it has been reported that he testified mainly along philosophical lines, largely critical of the Robinson-Patman Act.

Another witness who testified before the Domestic Council Review Group was Dr. Kenneth G. Elzinga, Professor of Economics, University of Virginia. He had "become persuaded that this [Robinson-Patman] statute is in need of critical assessment and revision." His full statement is printed in the hearings of the Ad Hoc Subcommittee.[10] The Ad Hoc Subcommittee also endeavored to have Dr. Elzinga appear before it, but without success.[11]

During the three-day hearings of the Review Group, a number of witnesses testified. At the request of the small business community, some of their representatives presented views against the proposals of the Department of Justice to repeal or amend the Robinson-Patman Act. Among those who spoke against such attempts to repeal or modify that Act were Honorable Earl W. Kintner who is a former Chairman of the Federal Trade Commission; Watson Rogers, President Emeritus, National Food Brokers Association; and John E. Lewis, Executive Vice President, National Small Business Association.

However, when the hearings of this Ad Hoc Subcommittee were underway and representatives of the Department of Justice had testified, it became apparent that no report would be issued by the staff of the Domestic Council on its hearings. Moreover, the media has reported that this matter had been placed by the staff of the Domestic Council on the "back burner" until near the conclusion of 1976.

D. ANSWER TO INCORRECT CLAIM THAT CONGRESS DID NOT KNOW WHAT IT WAS DOING IN PASSING ROBINSON-PATMAN ACT

Throughout the testimony of the witnesses who had been selected by that Domestic Council's panel to appear and testify against the Robinson-Patman Act, one finds the claim that the Robinson-Patman Act was rushed through the Congress in the winter of 1935–36 without adequate hearings or consideration. One witness contended that the law itself, therefore, rests on false premises. One official from the Antitrust Division of the Department of Justice has stated that:

> Very few public officials, particularly Members of Congress, have had any incentive to inquire into the actual economic impact of the Act on both large and small businesses and upon the consumer in today's economy.

Subcommittee Chairman Gonzalez, on December 18, 1975, took issue with these inaccurate statements, and in a speech in the House of Representatives, he in part stated:[12]

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[9] Hearings, pt. 3, pp. 303–306. Prof Baker's prepared statement to the Domestic Council is in the files of the Ad Hoc Subcommittee.
[10] Hearings, pt. 3, pp. 311-320.
[11] Hearings, pt. 3, pp. 306–311.
[12] Congressional Record, Dec. 18, 1975, pp. H13022–H13023.

Mr. Speaker, in other words, that attorney from the Antitrust Division of the U.S. Department of Justice is accusing the Congress of having had no incentive to inquire into the actual economic impact of the Robinson-Patman Act upon business and upon the consumer in today's economy. Also, that official has said: "The Robinson-Patman Act was based on a highly erroneous assumption about the process by which businesses set their prices."

Mr. Speaker, those who contend that the Congress has not carefully considered the economic significance of price discriminations and the possible impact upon such practices resulting from the enactment of the Robinson-Patman Act and, in turn, the impact of that law upon the economy of this country apparently are woefully uniformed. Numerous investigations, studies, hearings, and reports have been conducted and made by both the Congress and the Federal Trade Commission over the years regarding those matters.

For example, pursuant to Senate Resolution 224 of the 70th Congress, the Federal Trade Commission on December 14, 1934, in Senate Document No. 4 of the 74th Congress reported on an intensive and exhaustive investigation regarding the economic significance of acts and practices of price discrimination and the effects of such acts and practices on the economy and our free and competitive enterprise system.

In that connection, the Federal Trade Commission concluded that the then existing section 2 of the Clayton Act was insufficient to deal with such acts and practices, and recommended the strengthening of the anti-price-discrimination law. Thereafter, the Congress through a special investigating committee of the House of Representatives made an extensive investigation of price-discrimination acts and practices, following which extensive hearings were held by the Committees on the Judiciary of the House of Representatives and of the U.S. Senate on proposals on the Robinson and the Patman bills proposing to strengthen the laws against destructive price discriminations. Out of those proposals, the Congress enacted the Robinson-Patman Act."

Since that time, committees of both the House of Representatives and the Senate have held hearings and made prolonged studies of the economic significance of price discrimination and the impact of the Robinson-Patman Act. The prior hearings and studies made by the former Select Committee on Small Business are detailed in another chapter of this Report.[13]

In view of all these circumstances, it is clear that those who are criticizing the Congress of not having adequately studied and considered these matters either are uninformed or are deliberately undertaking to mislead the public concerning the antitrust laws in general and the Robinson-Patman Act in particular.

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[13] See Chapter VII of this Report.

Chapter XII. Effects and Consequences of Attacks Upon the Robinson-Patman Act

The investigations made, hearings held, studies undertaken, and reports written and issued by the various committees of the Congress and by the numerous agencies of the Government, as well as by persons not connected with State or Federal governments, seem to clearly reflect the thinking which motivated the attacks upon and the unjustified criticisms of the Robinson-Patman Act. As a direct result, this has caused some persons to believe that this important and necessary law should not be enforced because it was incorrectly alleged by that law's detractors that the Robinson-Patman Act is "anticompetitive."

During the Ad Hoc Subcommittee's hearing on November 19, 1975, the following exchange took place between Chairman Gonzalez and Assistant Attorney General Kauper:[1]

> Mr. Gonzalez. Mr. Kauper, in our letter to you, we specifically refer to statements that have been attributed to you.
>
> Mr. Kauper. Yes.
>
> Mr. Gonzalez. In opposition to——
>
> Mr. Kauper. Let me go through those statements. We have commented publicly—I have, Mr. Sims has, so have some others—suggesting that we think some reform of Robinson-Patman is necessary. We have, to a degree, identified those views as personal. In my case, I have simply indicated, I think, some concern with what I perceive as anticompetitive consequences of the act, and the belief that it needs some re-evaluation at this time.

The Assistant Attorney General then went on to state the Department of Justice felt "* * * there was a need for some reform of the Robinson-Patman Act."

He deemed that "* * * the best thing would be outright repeal; or, perhaps * * * substitute a much more specific predatory pricing statute for Robinson-Patman."[2]

Such views of officials of the Government who are sworn to enforce the law and are duty bound to do so cannot help but influence their official acts. Thus, the record shows the following colloquy:[3]

> Mr. MacIntyre. Mr. Kauper, I want to ask you, have you brought any cases, since you have been at the Department of Justice, alleging violation of the Robinson-Patman Act?
>
> Mr. Kauper. No.
>
> Mr. MacIntyre. None whatever?
>
> Mr. Kauper. No.

It is an elementary principle of Constitutional Law that Executive officers may not, by means of construction, orders, or otherwise, alter,

[1] Hearings, pt. 1, p. 586.
[2] Hearings, pt. 1, p. 587.
[3] Hearings, pt. 1, p. 603.

repeal, set at nought or disregard laws enacted by the Legislative Branch.[4] It is the Congress that passes laws and it is the duty of the Executive Branch, through its department heads, to enforce such laws and carry out the Congressional intent and mandate.

Statistical data furnished to this Ad Hoc Subcommittee by the Department of Justice confirms the testimony given by Mr. Kauper. Also, information in the files of the Ad Hoc Subcommittee reflects that not only Assistant Attorney General Kauper, but also his deputy and subordinates, including Mr. Sims, were involved with him in establishing policy decisions and in the taking of positions that the Robinson-Patman Act is not a good law and, therefore, does not merit strict and full enforcement.

That trend of thought and disparagement of the Robinson-Patman Act by officials of the Antitrust Division of the Department of Justice, as would naturally be expected, did have a considerable impact upon some professional staff members of the Federal Trade Commission. This is especially true because as a result of an exchange of letters in 1963 between the Department of Justice and the Federal Trade Commission, a liaison arrangement was formalized whereby the Federal Trade Commission handles all Robinson-Patman Act matters, with the exception of that law's Section 3, which part is a criminal statute,[5] over which the Department of Justice retains jurisdiction. The evaluation by some Justice attorneys, which in their opinion is to the effect that strict enforcement of the Robinson-Patman Act may not be in the best public interest, seems to have been transferred to the Federal Trade Commission by a process that may be likened to osmosis.

The Honorable Philip Elman, after having been in the Department of Justice, was appointed to the Federal Trade Commission. He mounted a campaign of speeches and articles critical of the Robinson-Patman Act, an example of which, in part, is as follows:

> [P]rice differences will naturally arise from the ordinary pressures of everyday bargaining and haggling in a competitive market. A price discrimination law which results in the elimination of such pressures would impair or obstruct the competitive process. Especially in a seller's market that is oligopolistically structured, the ability of a few buyers to obtain lower prices may be the only way in which a general reduction of prices in such a market can come about. In short, there is a compelling need to distinguish between those discriminations in price which may injure competition and those which reflect active and vigorous pressures of competition and which are a necessary concomitant of a healthy competitive system." Elman, "The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal," 42 Wash. L. Rev. 1, 9 (1966).

The above quotation was contained in a so-called "White Paper" [6] respecting the Robinson-Patman Act which carried quotations from a number of people who made speeches against that Act. Mr. Sims, the

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[4] *Kilburn* v. *Thompson*, 103 U.S. 168; *Martin* v. *Hunter*, 1 Wheat. 304.
[5] Hearings, pt. 1, p. 594.
[6] This so-called "White Paper" is in the files of the Ad Hoc Subcommittee.

Deputy Assistant Attorney General, transmitted this "White Paper" to the Office of Management and Budget.[7]

According to information, Commissioner Elman's votes during his tenure as a member of the FTC reflected his views against the full enforcement of the Robinson-Patman Act. This led the Commission to take a defensive position resulting in a dichotomy of policy at the top level which, quite naturally, had a chilling impact upon the law enforcement activities and efforts of the Federal Trade Commission's staff.

Former President Richard Nixon appointed Miles W. Kirkpatrick, Esquire, a member of the Philadelphia, Pennsylvania, Bar, as Chairman of the Federal Trade Commission effective September 1970. Mr. Kirkpatrick, who had also served the American Bar Association's Section of Antitrust Law, expressed views adverse to the full enforcement of the Robinson-Patman Act by the Federal Trade Commission. Almost immediately after taking the oath of office as Chairman of the FTC, he announced he is appointing Alan S. Ward, Esquire, an attorney in private practice, as Director of the Bureau of Competition of the Federal Trade Commission. At that time, the Bureau of Competition was charged with the duty of enforcing the Robinson-Patman Act as well as with other antitrust work.

Soon after Mr. Ward was appointed to this important post, the periodical Business Week had one of its writers interview Mr. Ward regarding his views and future plans for enforcement of antitrust laws which, of course, includes the Robinson-Patman Act. A report of that interview was published in Business Week [8] of October 17, 1970, which is as follows:

> Antitrust. On the antitrust front over the next few months, Ward is expected to push through as many as 20 cases now clogging the commission's pipeline. The FTC has been overshadowed by the Justice Dept.'s Antitrust Div. and its war on conglomerates, but Ward thinks the time has come for the commission to use its own storehouse of economic data on conglomerate mergers and concentrated industries to develop antitrust cases.
>
> One evidence of the new approach to antitrust at the FTC will be less enforcement of a major statute which the commission alone administers: The Robinson-Patman Act, outlawing favoritism among customers. Ward says he once thought the statute was entirely a mistake. Now he has changed his mind but still favors "more selective enforcement."

The Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce held hearings on "Federal Trade Commission Practices and Procedures" and one of the witnesses heard was Mr. Ward. During that hearing, Mr. Ward was interrogated respecting the decline in the number of Robinson-Patman Act cases brought by the Commission. In this connection, the answer that he gave sheds further light on the question; a part of his answer is as follows: [9]

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[7] Hearings, pt. 1, page 611.
[8] Business Week, Oct. 17, 1970, pp. 50–51.
[9] Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committeee, Hearings July 18, 1974, Serial No. 93–113, pp. 127–128.

When I came into the Commission one of the problems that was facing me at the beginning in the antitrust area was the appropriate role of Robinson-Patman enforcement. That was because there had just been a hearing before Congressman Dingell and it was also because Chairman Weinberger at the time he was Chairman of the Federal Trade Commission had made a commitment that the Commission's activity in the Robinson-Patman Act area was going to be reviewed, a study was going to be conducted by an outside consultant, and it was going to be useful in determining the appropriate role of Robinson-Patman enforcement at the Commission.

In addition to that, the staff was very conscious, and I was also, that the number of Robinson-Patman cases had declined substantially. In the early 1960's there had been, as Mr. Barnes testified, substantial numbers of Robinson-Patman cases filed, and there had been a great decline. One of the first things that I did when I got into the Commission was to have a meeting with the lawyers that had been involved in Robinson-Patman enforcement to find out what their recommendation was as to how we should undertake that program. Mr. Barnes was there. Frank Mayer was there. Dan Hanscom was there. Ivan Smith, all the lawyers that were involved in Robinson-Patman enforcement at the Commission, including for instance Ben Vogler, who was at that time assigned to a beer investigation which was pending at the time I got there.

I will say that the atmosphere was one of considerable discouragement. The Commission had been unable to figure exactly what its unified or even diverse opinion was about Robinson-Patman enforcement in the 2(c) area. The 2(f) area cases were dismissed that had been worked on for years, and in general there was a considerable disagreement as to what the Robinson-Patman program should be.

It was not long after Mr. Ward started his post as the Director of the Bureau of Competition, Federal Trade Commission, that his decisions about the handling of cases involving the Robinson-Patman Act reflected his views in directives to his staff. An example appears in the record of the testimony before the Special Subcommittee on Investigations. In the course of those hearings, Congressman J. J. Pickle (D-Texas), a member of that Special Subcommittee on Investigations, questioned the Honorable Ernest G. Barnes, Administrative Law Judge, FTC, who from July 1970 until December 1972 was Assistant Director of the Bureau of Competition and at that time was an assistant to Mr. Ward. The particular matter concerned decisions on whether to proceed with a complaint in a beer case involving charges that price discriminations were made in violation of the Robinson-Patman Act. In that connection, some of that testimony is quoted:[10]

Mr. PICKLE. Well, I am glad to have that differentiation.

Now during this particular time did you ever discuss the beer investigation with Mr. Ward?

Mr. BARNES. Yes, sir.

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[10] Printed record of hearings held July 18, 1975, by the Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committee, Serial No. 93–113, pp. 82–83.

Mr. PICKLE. When did you discuss those others with Mr. Ward?

Mr. BARNES. It would have happened daily or weekly. We were very concerned about the beer case that it was not being moved forward fast enough or successfully enough so we discussed it quite often.

Mr. PICKLE. You discussed it regularly then with Mr. Ward?

Mr. BARNES. Yes, sir.

Mr. PICKLE. Do you feel that there was a case for complaint under the Robinson-Patman Act with reference to the beer case?

Mr. BARNES. Yes, sir.

Mr. PICKLE. Did you make that recommendation to Mr. Ward?

Mr. BARNES. Well, we discussed it. We never got to any final recommendations on the beer case. It was decided to make beer into a structure case.

Mr. PICKLE. Before you made that decision, was it your opinion that a case could be made under the Robinson-Patman Act on the beer case?

Mr. BARNES. Yes, sir. We had compiled a substantial amount of information, it was about this time that the Pearl/Anheuser-Busch private litigation was in progress down in Houston, I believe it was, and the district court came out with an opinion discussing the evidence in the file. At that time it appeared to me that there would have been a pricing case that we could make, a promotional allowance case that we could make and a possible price fixing case that we could have made.

Mr. PICKLE. You agreed with the court in that there was sufficient evidence?

Mr. BARNES. From what the court's opinion stated it appeared to me there was sufficient evidence for the Commission to have brought a case.

Mr. PICKLE. My specific question to you is, do you feel that a suit should have been brought under the Robinson-Patman Act at that point?

Mr. BARNES. At that point, yes, sir.

Mr. PICKLE. And you so recommended to Mr. Ward?

Mr. BARNES. Well, I am sure we discussed it and that would have been my viewpoint.

Mr. PICKLE. Are you indefinite as to whether you made that recommendation?

Mr. BARNES. Well, I would say we discussed it and we discussed the fact that we could make a case. Mr. Ward was more interested in having an industrywide structure type case so we never followed through on any written recommendations.

* * * * *

Mr. PICKLE. Why would this case have dragged out this long?

Mr. BARNES. Well, here you have the basic conflict between Sherman Act proponents and Robinson-Patman proponents. It is difficult to get the Commission to undertake a Robinson-Patman case. It is a difficult case to make and the Commission just never turned its mind to making a Robinson-Patman case here. We could have made a case in my opinion.

At the November 5, 1975, hearings of this Ad Hoc Subcommittee, Congressman Pickle appeared and testified. Congressman James M. Hanley (D-N.Y.), Vice Chairman of the Ad Hoc Subcommittee, after listening to Congressman Pickle relate the facts of the Special Subcommittee on Investigations' hearings concerning the lack of enforcement of the Robinson-Patman Act by the Federal Trade Commission and its effect on small business, made the following comment: [11]

Mr. HANLEY. Thank you, Mr. Chairman.

Jake, to your testimony I say Amen. So much of what you have said I have a bit of personal involvement in. I think of the baking industry in the State of New York and there are, I believe, but one or two independent major bakeries left in that State.

You make reference to ITT Continental. I recall the situation that I was deeply interested in affecting a bakery in one of the communities in my district, Durkee's bakery in Cortland, New York. They appealed to FTC under the provisions of this act some years ago. There was little in the way of response to that appeal. I tried with FTC but to no avail.

No reaction on the part of the FTC resulted in the demise of that bakery. It employed about 350 people in that community of approximately 50,000 people. It was considered a major industry in that community, and it is no longer in existence.

The effect on that was that beyond the bakery aspect of it per se, the spinoff that was enjoyed by that community, whereas it maintained a fleet of about 125 trucks, all of the tires and whatever is needed in the operation of the fleet were purchased locally from that community. And so be it with all of the needs of that plant that were purchased locally.

So resulting from the demise of that industry, all of the small businesses in that community were affected.

As I was saying back then, you see this happening throughout America where that independent is being driven out of business. Yes, the biggie comes on and offers, you know, a relatively low price or whatever goodies it offers, that the independent cannot possibly offer. Once the biggie kills the independent then it has got the marketplace to itself and then it can do whatever it wants.

Among the distinguished economists who testified at the Ad Hoc Subcommittee's hearings was Dr. Vernon A. Mund, Professor Emeritus, University of Washington, Seattle, Washington. He served as Professor for some 43 years specializing in industrial pricing methods, price discrimination, the Clayton Act and the Robinson-Patman

[11] Ad Hoc Subcommittee hearings, pt. 1, p. 27, No. 5, 1975.

amendments. This acknowledged authority and well-known author testified, in part, as follows: [12]

> On page 4 of your statement, of your views in response to the chairman's questions, written questions to you, you refer to a study you made in 1961 or 1962, in Hawaii concerning pricing of macaroni and spaghetti paste. And you described why you made that study.
>
> May I ask you this? How many manufacturers of that product then existed in the State of Hawaii?
>
> Dr. MUND. I believe at that time there was only one manufacturer of macaroni and spaghetti. There were a number of manufacturers of oriental noodles; but just one.
>
> Mr. MACINTYRE. One manufacturer and he was competing with the Northwest and Central State producers who were shipping macaroni to compete with him in Hawaii.
>
> Dr. MUND. That is correct.
>
> Mr. MACINTYRE. And they sold—they were in competition with him, at lower prices than they were selling near their home bases.
>
> Dr. MUND. They sold at substantially lower prices because they paid the freight and handling charges and they not only met his price on occasion, but sometimes undercut it.
>
> Mr. MACINTYRE. Now, you are aware of a complaint that he made to the Federal Trade Commission about this?
>
> Dr. MUND. Yes.
>
> Mr. MACINTYRE. Did the Trade Commission stop the practice?
>
> Dr. MUND. Not to my knowledge.
>
> Mr. MACINTYRE. What happened to that single producer in Hawaii?
>
> Dr. MUND. He went bankrupt.

A large number of cases, which were called to the attention of the Federal Trade Commission alleging price discrimination practices by large firms against their smaller competitors, were closed. In other words, the Federal Trade Commission's staff, or at least a large part of them, were becoming convinced that the arguments which were made by a small group of attorneys in the Antitrust Division of the Department of Justice that the Robinson-Patman Act is not a good law, were having a strong effect. Another example is in the Ad Hoc Subcommittee's record of hearings where Dr. Frederic M. Scherer, Director, Bureau of Economics, FTC, may be found. Dr. Scherer's views are not favorable toward the Robinson-Patman Act and the following exchange between the Subcommittee's Special Counsel and Mr. James M. Folsom, Dr. Scherer's Deputy, took place: [13]

> Mr. MACINTYRE. Dr. Scherer, you have been talking about large and small companies proceedings against them. I am going to ask you about a company and a complaint that came to the attention of the Bureau of Economics. The Commission received this complaint several years ago. It involved computer scales for butcher shops and supermarkets. Do you recall that, Mr. Folsom?

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[12] Ad Hoc Subcommittee hearings, pt. 3, p. 65, Feb. 2, 1976.
[13] Ad Hoc Subcommittee hearings, pt. 3, pp. 23–24, January 28, 1976.

Mr. FOLSOM. Yes, sir.

Mr. MACINTYRE. It's the *Hobart Manufacturing Company* case, FTC file 110012. That company is not in Fortune's 500, is it?

Mr. FOLSOM. I would be surprised if Hobart is not. It's a sizable company which has a number of activities other than scales. I don't know its exact sales. I'd be happy to check that. [The check revealed that Hobart ranked 432d in the 1975 Fortune 500 list.]

Mr. MACINTYRE. Certainly, on the basis of its scales, it wouldn't rank in the first 500 corporations in this country, would it?

Mr. FOLSOM. In terms of scales, I think its sales were about $13 million. It doesn't follow that it's not in the 500, in terms of total sales, which is the measure used by Fortune.

Mr. MACINTYRE. It was No. 2 in scales industry, wasn't it?

Mr. FOLSOM. It was No. 1 in that industry, not No. 2.

Mr. MACINTYRE. All right. A complaint was made against it, and the Commission closed that case, didn't it?

Mr. FOLSOM. That's correct.

Mr. MACINTYRE. Mr. Chairman, I'd like to read a letter from a very prominent member of the Congress to the Federal Trade Commission dated June 21, 1972, and here is what the letter says about that: "It was now my understanding that a draft complaint in the above entitled matter is soon to come before the members of the Federal Trade Commission for decision as to whether a complaint should issue."

This is in the *Hobart* case we are talking about.

"I feel very strongly that this represents a type of proceeding which should be investigated thoroughly and adjudicated by the Commission. As I understand it, the matter involves illegal and discriminatory pricing, as well as offering retail merchants equipment which facilitates their giving, either deliberately or unintentionally short weight to the consuming public. Such a combination would provide Hobart with a most effective and unfair anticompetitive weapon which would threaten continued competition in the important field of automatic scales. Since I am certain that you are familiar with the allegations which have been made, it does not seem necessary for me to cover them in detail. Certainly, should these claims be proven well founded, the potential ramifications would, indeed, be most serious, and would definitely seem to warrant the issuance of a complaint so that the necessary remedial action can occur."

That was in 1972.

What was the recommendation of the Bureau of Economics that the Commission do with that?

Mr. FOLSOM. We recommended that the Commission close the Hobart investigation on several bases.

Mr. MACINTYRE. Read the concluding paragraph in the memorandum where you reached your conclusion on it.

Mr. FOLSOM. It says: "Based on the above discussion," without citing any of the matters discussed, "further Commission

resource commitments for this investigation, both in the automatic computing scale and retail food markets are not recommended.

"It is our opinion that, while compulsory process may add to the previous discussion, it should not alter the basic conclusions. And, at the same time, it will require further Commission resources. Therefore, it is recommended that the investigation be closed."

Mr. MACINTYRE. Now, Mr. Chairman, we also have in our files letters as to the results. On December 19, 1974, the Secretary of the Federal Trade Commission forwarded letters to Senators from that particular State, and from the gentleman who wrote the letter which I have just quoted. The Commission said, this is subsequent to the memorandum Mr. Folsom just read from:

"Re: Hobart Manufacturing Company File No. 711 0012

"Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. The action the Commission has taken is not to be construed, as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public may require."

The matter was therefore closed * * *

At the Ad Hoc Subcommittee's hearing on November 5, 1975, the Vice Chairman of the Subcommittee, Congressman Hanley, asked Congressman Pickle why the Federal Trade Commission adopted an attitude of indifference to the enforcement of the Robinson-Patman Act and it has been negligent in its responsibility with which the Commission is charged by law. In reply, Congressman Pickle said, in part:[14]

Mr. PICKLE. * * *

It seems to me like when a Robinson-Patman case has been filed or been looked at, the FTC ought to pursue it and pursue it quickly. The essence of effectiveness under the Robinson-Patman is probably to get action on Robinson-Patman Act to stop some type of predatory practice before it goes on and on and then they see no alternative except to try to make it into a big structure case or Sherman Anti-Trust Act. I don't think FTC pursues it quickly enough. They may say they don't have the manpower. I think that would be one observation. I think they also said until about a year or two ago they didn't have subpena power of their own, and they couldn't go out and issue subpenas and require this information. I think for a period of time that that held them back. They couldn't get these companies to come in under subpena, give the information, and it delayed 6 months, 8 months, and they demurred and refused to come in and give the information.

[14] Ad Hoc Subcommittee hearings, pt. 1, page 28.

> They have that subpena power now and they can do it. I am afraid what the FTC has done just has accepted the growth of big business, big supermarkets, and they have just kind of laid down and played dead to the problem and not try to force it. I believe it is a purposeful decision not to do anything about the Robinson-Patman cases.
>
> Mr. HANLEY. Maybe it would be well to consider mandating a timeframe in which the FTC was required to work. They, as you have indicated, can play with this sort of thing. I relate again to that independent bakery that didn't have access to the legal talents that ITT-Continental would have. FTC then can play with something for a number of years. In the meantime the patient has died.

The record of the hearings in these proceedings of the Ad Hoc Subcommittee contains a large volume of testimony, from not only representatives of hundreds of thousands of small business firms, but also from attorneys on the staff of the Federal Trade Commission as well as a number in the private practice of law who have had decades of experience in dealing with situations and problems arising from price discrimination practices. The weight of their testimony is to the effect that in recent years it has proven difficult, if not practically impossible, to persuade the Federal Trade Commission, the Department of Justice, or other Governmental agencies to become interested in and act upon complaints by business firms who are victimized by price discrimination practices. In other words, the policymaking and decisionmaking officials in the agencies of the Government have apparently become prejudiced against the Robinson-Patman Act and have determined that they should not enforce that law unless the evidence is so overwhelming and they would not escape criticism.

The Honorable Paul Rand Dixon, Acting Chairman of the Federal Trade Commission, testified: [15]

> I always begin with the assumption that the Commission's primary obligation is to interpret and enforce the law passed by Congress and signed by the President. While the Federal Trade Commission Act prescribes that the Commission shall issue a complaint if it has reason to believe a violation has occurred and if it deems a complaint to be in the public interest, this latter standard is clearly not warrant for the Commission to substitute its own judgment for that of Congress by determining that a particular statutory provision should be enforced. I believe that in a democratic society, the paramount decision as to the utility of the law resides with the legislature; and until a law is altered or repealed the presumption that its enforcement is in the public interest must take precedence over any contrary views of those hired to do the enforcing.

In grappling with the matter of enforcement, the words of FTC Commissioner Stephen Nye are particularly pertinent; he said: [16]

> I was therefore surprised, and it was a surprise that came over me gradually, so perhaps that isn't the word; I finally

[15] Ad Hoc Subcommittee hearings, pt. 3, pp. 86–87.
[16] Ad Hoc Subcommittee hearings, pt. 3, p. 106.

realized that we were not getting very many cases at the Commission of any kind at all. Very, very few were coming to the Commission. I therefore join wholeheartedly in the effort that Chairman Dixon has described, to make sure that the Commissioners now see the preliminary investigations which are not opened; preliminary investigations that are closed; the reports of the evaluation committee, and all other aspects of enforcement of the Robinson-Patman Act, and all other enforcement responsibility of the Commission, so that when a case comes up that may not seem very important to anyone else, but seems important to me and Ms. Dole, and Chairman Dixon, we will have our say as well.

Bartley T. Garvey, Esquire, an attorney in the Office of the General Counsel of the Federal Trade Commission, made the following remark regarding the lack of sufficient enforcement efforts by the FTC:[17]

Mr. Garvey, would you have any observations?

Mr. GARVEY. I believe that Robinson-Patman enforcement at the Commission is below a level of enforcement that is appropriate. I believe that the enforcement of the Robinson-Patman Act is not sufficient to constitute an effective deterrent force, and enforcement now is at a token level and should be increased.

The Honorable John Breckinridge, a Member of the Ad Hoc Subcommittee, addressed a question to Assistant Chief Administrative Law Judge Barnes respecting the lack of FTC's enforcement of the Act; the following is an excerpt from the hearings:[18]

Mr. BRECKINRIDGE. * * *

Counsel introduced yesterday a series of exhibits, and, just for perspective, I want to put forward a figure. In fiscal year 1966, there were 599 employees in antitrust; in 1974 it dropped to 322, and then it went up to 503, if I understood Mr. Johnson correctly, perhaps because of the new emphasis on the buyer side of the litigation.

In 1966 the total expenditures for this activity constituted 52.2 percent of the commission's assets, and now it has dropped to 32.9 percent.

The Bureau of Competition's formal investigations went from 585 in 1965 to 27 in 1974, which means we might as well lock the door. I don't know who we're spending the money on people in places not doing anything; or maybe, they're doing things I don't understand, but in 1969 there were 120 total cases, 101 of which were closed. In 1970 there were 178 cases total, 152 of which were closed, and then there were 21 closed in 1974; and then, in Robinson-Patman orders, since the Finality Act, starting 60 under section 2(a), and there were 5, and in 1961 there were 11, in 1962 there were 11, in 1963 there were 7, in 1964 there were 28, and from there on out they decreased down to the point of 1 in 1972, 1 in 1973, 1 in 1974, that would merit 1 attorney and one-half of an economist,

[17] Ad Hoc Subcommittee hearings, pt. 3, p. 6.
[18] Hearings, pt. 3, p. 4.

and one-fourth of a secretary, and now, I take it, we've got 2 in 1975. That's under section 2(a).

Then under 2(c) we have the same sort of dramatic figures. In 1961 there were 56, in 1962 there were 37, in 1963 there were 17; for the years 1964, and 1965 there were 1 each, 1967 1 each, and a dramatic increase to 6 in 1968 and 1969; and then a significant decrease to 0 in 1970, 1971, and 1974; and 2 for the remaining years.

Now, just a toboggan in enforcement efforts and activity—under 2(d), they went from 33 in 1960 to 225 in 1963. Then it crept beyond 81, 32, 65 in 1963. Then it crept beyond 81, 32, 65 in 1966, and then that dramatic toboggan, 9, 2, 0, 6, 1, 0, 2, 0. It's really, to me, just shocking.

Under section 2(e) and 2(f) there's a big line of 1's and 0's. I wonder if you would address yourself to the forces in back of that record for this record?

Judge BARNES. The forces back of it are the people who—the policy planning and evaluation people. Those are the people who have stopped the Robinson-Patman cases.

I have been out of the Bureau for 3 years now, but when I was there, the beginning of this fight against Robinson-Patman started. The people who initiated the cases, who have the authority to say whether or not an investigation should go forward, these are the people who are responsible for the low figures. The memorandum that Mr. Higgins has read to you here today gives you some idea of the factors which have influenced the view of the Bureau of Competition not to bring any Robinson-Patman cases.

Judge Barnes commenced his work at the Federal Trade Commission during August 1955 as an attorney-investigator in the Washington Regional Office of the FTC. He is, therefore, a career Federal official and rose to the high post of Assistant Chief Administrative Law Judge. This knowledgeable official, at the Ad Hoc Subcommittee hearings on January 26, 1976, testified directly just how the negative views about the Act percolated from the top downward to stifle and thwart enforcement of Robinson-Patman cases, in these words:[19]

> During the pendency of an investigation, matters were constantly reviewed as to possible success in establishing a violation of law and the probable impact on the economy if a violation were established, as well as a close monitoring of the costs involved in the proceeding. These same considerations continue throughout the life of a proceeding—should a case be settled now? Is the relief we can obtain in the public interest considering the proof of violation available and the ultimate cost of realizing the desired objective?
>
> The above criteria apply generally to all proceedings, whether section 5, Federal Trade Commission Act, or Robinson-Patman Act matters. These are the criteria which I considered during my tenure on the staff. Other officials, however, in applying these general criteria, assign different values to different factors. Herein lies the problem. Officials

[19] Hearings, pt. 2, pp. 174–175.

who do not believe in Robinson-Patman Act enforcement assign no public interest to such proceedings.

This viewpoint permeates the staff attorneys, and enforcement comes to a halt. Even if an investigation of a possible Robinson-Patman Act violation is authorized and a number assigned, no staff attorney wants to spend several months of hard work developing a violation of law when he fears the matter ultimately will be closed without any action of any kind.

While I was a member of the enforcement bureaus of the Commission, the Bureau of Economics was usually involved in a legal investigation on a request only basis. In other words, if the legal staff believed economic assistance was needed, such assistance was requested and usually received. During 1971 and 1972, a policy developed within the Bureau of Competition of referring certain matters to the Bureau of Economics for comment before sending a final recommendation to the Commission.

By the end of 1972 at the time I left the Bureau of Competition, it was mandatory that the Bureau of Economics be consulted before any matter was assigned for a full investigation, and all matters were sent to the Bureau of Economics for comment before a final recommendation was forwarded to the Commission.

I personally always took into account the analysis made by the Bureau of Economics in matters where such an analysis was available. It was my experience that the Bureau was always negative on Robinson-Patman Act matters. On occasions their analyses of matters tended to infringe upon what I perceived to be areas involving legal considerations. Thus, while an economic analysis can be helpful, I was of the firm belief that other considerations were equally important, and that final authority should rest with the legal staff."

Federal Trade Commissioner, the Honorable Elizabeth Hanford Dole, submitted a statement to the Ad Hoc Subcommittee which was made a part of the record of its hearings.[20] Eugene A. Higgins, Esquire, an attorney in the Bureau of Competition, FTC; [21] former FTC Executive Director Basil J. Mezines, Esquire,[22] now in the private practice of law; and the former Chairman of the Federal Trade Commission, the Honorable Earl W. Kintner,[23] supplied the Ad Hoc Subcommittee with vital and important testimony.

Additional expert witnesses were heard which included Jerrold G. Van Cise, Esquire, a private attorney having more than 40 years of work, both in the courts and in practice, in the handling of antitrust cases and matters involving the Robinson-Patman Act.[24] Dr. Vernon A. Mund, who is Professor Emeritus, University of Washington, gave the Ad Hoc Subcommittee the benefit of his expertise regarding the subject of the Subcommittee's investigation.[25] Mr. Stewart W. Pierce

[20] Hearings, pt. 3, pp. 78–82.
[21] Hearings, pt. 3, beginning at p. 1, and et seq.
[22] Hearings, pt. 2, beginning at p. 2, and et seq.
[23] Hearings, pt. 1, beginning at p. 222, and et seq.
[24] Hearings, pt. 2, beginning at p. 215, and et seq.
[25] Hearings, pt. 3, beginning at p. 42, and et seq.

of Richmond, Virginia, who is knowledgeable about delivered pricing practices, testified regarding FTC's Advisory Opinion 147 and also submitted his prepared statement.[26]

Mr. John E. Lewis, Executive Vice President of the National Small Business Association, was heard and testified at length. He furnished the Ad Hoc Subcommittee with a long list of many small business groups and associations that are working for the preservation and enforcement of the Robinson-Patman Act.[27]

Much of the testimony, which constitutes an important part of the record, was given by spokesmen for a variety of industries and small businesses. Some of these witnesses were: Mr. Watson Rogers, President Emeritus, National Food Brokers Association;[28] Mr. Jim C. Page, a businessman owning and operating a dairy and dairy products business and who is Chairman, Legislative Committee of the National Independent Dairies Association;[29] Mr. Lee Richards, President, Hygia Dairy Company;[30] Mr. Phil Simpson, Chairman, Republic Housing Corporation;[31] Mr. Claude Huckleberry, former President and founder of the Texas Gypsum Company, whose testimony startled the Members of the Ad Hoc Subcommittee as to the extreme measures taken by certain individuals in their attempts to destroy a business;[32] and other witnesses.

The printed record of the testimony of the witnesses makes clear that there had been an avoidance of enforcement of the Robinson-Patman Act by those Governmental agencies and departments whose duty it was to uphold the law and obey the mandate given them.

The Honorable James M. Hanley (D-N.Y.), Vice Chairman of the Ad Hoc Subcommittee, found it necessary to temporarily leave the hearing in order to attend another urgent meeting which he had to chair. He requested to comment on the situation, stating:[33]

> Mr. HANLEY. Thank you very much, Mr. Chairman. Unfortunately, time does not allow the opportunity to question. I just want to say that it appears to me that the culprit in the problem that we are dealing with appears to be Commission policy.
>
> I think the statistics we cited here this morning, and the various responses provide a very clear illustration, again, of a law having been repealed by bureaucratic order or edict, which is most unfortunate.
>
> I feel that, if the implication is documented, then moves should be made in the direction of citing those responsible in the Commission for a contempt of the Congress.
>
> Having said that, I have got to leave and I hope to get into this further as we move along with this hearing.
>
> I thank you, Mr. Chairman.

The statistical data showing the decline in the enforcement of the Robinson-Patman Act by the Federal Trade Commission to which

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[26] Hearings, pt. 2, pp. 31–36.
[27] Hearings, pt. 1, pp. 37–53.
[28] Hearings, pt. 1, pp. 162–167.
[29] Hearings, pt. 1, beginning at p. 460 and et seq.
[30] Hearings, pt. 1, pp. 53–161.
[31] Hearings, pt. 1, beginning at p. 507, et seq.
[32] Hearings, pt. 1, pp. 36–57.
[33] Hearings, pt. 3, p. 15.

Vice Chairman Hanley referred are documented in the record of the Ad Hoc Subcommittee hearings.[34] Those tabulations and charts may be found in this Report marked as "Appendix A." They show, for example, that there was a decline in Section 2(a), Robinson-Patman anti-price discrimination cases by the Federal Trade Commission, from a total of 28 in 1964 to one (1) in 1974 in which cease and desist orders were issued. Only 2 were issued in 1975. Likewise, these charts show that there was a similar drop-off in Robinson-Patman Act cases brought under other subsections of that law in that same period of time by the Federal Trade Commission, which resulted in cease and desist orders. And as heretofore discussed in the same period, the Antitrust Division of the Department of Justice was bringing *no* cases under the Robinson-Patman Act.

The sharp decline in the enforcement of the antitrust laws by the Federal Trade Commission and the Department of Justice against those charged with price discrimination practices caused private parties themselves to proceed against violators of the antitrust laws. These cases have included not merely those that charge violations of the Robinson-Patman Act, but also those that charge violations of other antitrust laws. The filing of new antitrust law cases continued to boom in fiscal year 1970, according to the annual report of the Director, Administrative Office of the United States Court. These statistics reflect that in 1975, 1,375 such private cases had been brought for violations of the antitrust laws,[35] which clearly indicate that antitrust law enforcement is now for the most part conducted by private parties.

However, if the proposals which have been advanced by the small group of attorneys in the so-called "Regulatory Reform Unit" of the Department of Justice's Antitrust Division were to be adopted, these private parties who instituted court proceedings charging violations of the Robinson-Patman Act would effectively, in many of these cases if not all, be deprived of relief.

The Office of Policy Planning and Evaluation is a part of the organizational arrangement of the Federal Trade Commission, of which Mark F. Grady, Esquire, is Acting Director. Its functions are to make recommendations to the FTC on matters of policy and the programs it deems the FTC should undertake. During the Ad Hoc Subcommittee's January 27, 1976, hearing, at which Mr. Grady was questioned, Special Counsel MacIntyre referred to a certain FTC memorandum showing that the Office of Policy Planning and Evaluation and some in the FTC's Bureau of Economics were adverse to the enforcement of the Robinson-Patman Act. It also reflected their views that they did not subscribe to the declared public policy of the United States that [36]

> * * * the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns * * *

For example, in July 1974, the FTC Office of Policy Planning and Evaluation made a report to the Commission in which it commented on small business in very derogatory terms in connection with a dis-

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[34] Hearings, pt. 2, pp. 183–191.
[35] Ad Hoc Subcommittee hearings, pt. 3, p. 172. This tabulation is also in the Report marked as Appendix B.
[36] Sec. 2(a), Small Business Act, 15 U.S.C. 631(a).

cussion respecting the concentration of economic power. The following is the exchange between the Special Counsel and Mr. Grady: [37]

> Mr. MacIntyre. Well, the memorandum in the files of the subcommittee shows several pages dealing with that and discussions concerning it so I won't take the time of the subcommittee to go into that.
>
> But at the conclusion of the discussion on concentration, there is this paragraph:
>
> The implications of what has been said limit the necessity of extended comment on this point. If concentration is permitting collusion, the smaller firms will not be "deteriorating." They will be thriving. If concentration is characterized by efficiency in larger units, if these larger units are competing, the competitive viability of smaller firms is, as well it should be for all inefficient operations, most likely deteriorating.
>
> Do you recall that report from the Office of Policy Planning and Evaluation to the Commission?
>
> Mr. Grady. Yes. I do recall the report.
>
> Mr. MacIntyre. Including that comment?
>
> Mr. Grady. Yes.

The Ad Hoc Subcommittee was pleased to note that before the Honorable Lewis A. Engman resigned as Chairman of the Federal Trade Commission, there was some increase in Robinson-Patman Act enforcement activity by the FTC.[38]

A portion of the official transcript of the hearings of the Senate Committee on Commerce of March 10, 1976, regarding the confirmation of the nomination of the Honorable Calvin J. Collier as Chairman of the Federal Trade Commission was made part of the Ad Hoc Subcommittee hearings.[39] His testimony is of particular importance as showing that he is not opposed to actions against price discrimination practices and that he does not support the Department of Justice proposals for repeal or so-called "reform." The following is a portion of that transcript:

> Another draft is labeled Robinson-Patman Act Reform Statute, and Section 10 of this draft provides, "Section 5 of the Federal Trade Commission Act shall not be held to prohibit any discrimination in price for the sale of commodities or the receipt of any such discrimination."
>
> Do you support the legislation proposed by the Department of Justice?
>
> Mr. Collier. No.
>
> Senator Moss. Do you favor elimination of jurisdiction by the Federal Trade Commission in the area of price discrimination?
>
> Mr. Collier. No.
>
> Senator Moss. Do you feel the policy of encouraging small business from the point of view of Congress and the antitrust authorities rests on sentimental, political, or emotional factors only?

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[37] Ad Hoc Subcommittee hearings, pt. 2, p. 201.
[38] See Appendixes A and B of this Report.
[39] Ad Hoc Subcommittee hearings, pt. 3, pp. 353–355.

Mr. COLLIER. No.

Senator MOSS. What is your feeling about the continuation and furtherance of legislative policies, including antitrust that have the effect of encouraging small business?

Mr. COLLIER. I think that antitrust can do that. I think that in many cases the proper enforcement of the act will do that—of the various antitrust acts—will do that.

Although the indications are that the Federal Trade Commission is now improving and increasing its activity in the enforcement of the Robinson-Patman Act beyond what the record shows for past years, there are positive implications in the above quoted testimony of FTC Chairman Collier. However, it remains to be seen what all this means. In other words, is this temporary improvement to extend only during the existence of this Ad Hoc Subcommittee, or does it mean more than that? Only the future will answer that.

Chapter XIII. The Record and Reason Rufute Specific Criticisms of the Robinson-Patman Act

Among the criticisms leveled at the Robinson-Patman Act is that it prohibits price discriminations and that the right to charge different prices to different customers for identical items would enhance competition. Therefore, it is alleged the Robinson-Patman Act is anti-competitive. In that connection, it is argued that the Robinson-Patman Act promotes rigidity of prices in that it prohibits flexibility that would arise if sellers were permitted to make different prices to different customers.

These arguments were made by some lawyers in the Department of Justice's Antitrust Division after the proposals for the repeal and so-called "reform" of the Robinson-Patman Act were drafted, at meetings with Congressional staff members on July 29, 1975,[1] and also in connection with the "White Paper"[2] referred to in another chapter of this Report. Such arguments were also advanced by Dr. Kenneth G. Elzinga, a professor of economics, and Professor Donald I. Baker, both having testified at the hearings of the Domestic Council.[3] Although these witnesses were invited to appear and testify before the Ad Hoc Subcommittee, they were unavailable.[4] Dr. Elzinga's testimony before the Domestic Council was made a part of the printed record of the Ad Hoc Subcommittee's hearings;[5] Professor Baker's testimony at the Domestic Council hearings is in the files of the Subcommittee.

When these arguments are tested and compared with reality, in the light of experience, history and the accepted principles of economics, such arguments are found to be fallacious and untenable. The truth is contrary to such arguments, for it has been proven that price discrimination practices actually destroy competition and evidence of this fact, the investigations made over the years by committees of both the Senate and House of Representatives may be cited. Thus, the Senate Select Committee on Small Business, in a report[6] which incorporated another document issued by the Federal Trade Commission on this subject, stated:

C. PRICE DISCRIMINATION

> The practice of price discrimination is particularly destructive to small firms. When discriminatory price concessions are made they are seldom, if ever, granted to the small buyer. And, having to pay a higher price for his merchandise than his large competitor, the small buyer is handi-

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[1] Ad Hoc Subcommittee hearings, pt. 1, p. 590.
[2] Supra, p. 610.
[3] See Chapter XI of this Report.
[4] Ad Hoc Subcommittee hearings, pt. 3, pp. 303–311.
[5] Hearings, pt. 3, pp. 311–320.
[6] (Monograph on Monopolistic Practices and Small Business in Reports on Monopoly Hearings, Part 1, page 8, Monopoly Subcommittee, Prints 1–9, Volume 8 of the Select Committee on Small Business, United States Senate, 82nd Congress, 2nd Session.)

> capped at the very beginning of the competitive race. Moreover, price discrimination is a handy and effective instrument by which small sellers are disciplined and brought into line by their larger rivals. Insofar as the business cycle is concerned, the frequency of price discriminations tends to be the reverse of the denial of supplies, becoming of greatest importance in periods of declining activity.

The Ad Hoc Subcommittee has received extensive testimony covering factual situations where price discrimination has recently been used with the effect of destroying what price competition continues to exist in some industries.[7]

The testimony of these witnesses reflects their many years of experience in dealing with factual situations in which price discriminations have been practiced. The testimony of some of these witnesses cover experiences of many years in dealing with such factual situations. For example, the Honorable Earl W. Kintner, who served for many years as Counsel for the Federal Trade Commission and later as its Chairman, considered factual situations which involved price discrimination acts and practices. Likewise, witnesses Barnes, Brookshire, Garvey, Higgins; Commissioners Dixon, Nye and Dole; Mund, Van Cise, as well as Basic J. Mezines, and others, based their testimony on a total of hundreds of years of experience in dealing with these factual situations involving the use of price discriminations. The testimony by witnesses Simpson, Ellsworth and James Page, of course, reflected their experience in substantial small business firms of different industries and the destructive character of price discriminations being used to eliminate competition in their respective industries. Some of their testimony in this record referred to current price discrimination practices.

In addition, the Ad Hoc Subcommittee received testimony from representatives of approximately 3,500,000 small business firms and businesses [8] which not only detail the destructive character of price discrimination practices, but express the alarm of these representatives of business enterprises over the prospect that legislative curbs to such destructive price discrimination practices are now being proposed for repeal by the attorneys in the Antitrust Division of the Department of Justice.

The Ad Hoc Subcommittee does not find it necessary to rely, as it could do, entirely upon the record of the testimony of the witnesses and the exhibits it received in the course of its hearings, but it also fully considered and made reference and a part of its own record the prior hearings and reports of the Select Committee on Small Business of the House of Representatives and other Congressional committees of both the House and Senate as noted in other chapters of this Report. In this connection, another portion of a report of the House Select Committee on Small Business [9] may be appropriately quoted:

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[7] See Hearings regarding the testimony by witness Simpson commencing at Part 1 of the Record, page 507; Ellsworth, page 520; James Page at page 460; Kintner at pages 237–242; and testimony appearing in the printed record of the Ad Hoc Subcommittee, Part II, testimony of a Van Cise, page 215; witness Barnes, page 168; Brookshire, page 70; Garvey, page 163; Higgins, page 175; and testimony appearing in the record of the Ad Hoc Subcommittee, Part III, by FTC Commissioners Dixon, Nye and Dole; as well as that appearing in the form of testimony by former Executive Director of the Federal Trade Commission Mezines, Part II, commencing at page 2.

[8] Hearings, pt. 1, pp. 37–523.

[9] H. Rept. 2966 (84th Cong., 2d Sess.) at p. 136.

SHORTCOMINGS OF THE ORIGINAL CLAYTON ACT AND THE GENERAL PURPOSES OF THE ROBINSON-PATMAN AMENDMENT

Two decades of enforcement experience under the Clayton Act showed up the inadequacy of section 2 to slow down the pace of monopolization. The fantastic growth of a few monster chain-store organizations was giving rise to a considerable amount of State legislation, including special chainstore taxes, passed in a futile attempt to halt the avalanche of chainstore encroachment which was leaving thousands of crippled or ruined retail and wholesale firms the victims of unjust discriminatory practices.

Extensive studies by the Federal Trade Commission found that price discrimination was by no means on the wane; if anything, the situation was more serious even than it had been at the time the Clayton Act became law. The Federal Trade Commission studies left no doubt that discriminatory practices were rampant, especially among the chainstores, with devastating effects on smaller firms.

In a 6-year investigation of the causes of monopolization in the distribution field, initiated in 1928 at the request of Congress,[432] the Commission found price discrimination to be the major evil contributing to the spread of distribution monopolies. On the supplier level, the chainstores were found to take discriminatory advantage by demanding special and unwarranted price concessions on the purchases they made from their suppliers. In the other direction, to gain advantage over their competitors the chains frequently discriminated at retail by holding up prices where competition was absent or weak, and at the same time slashing prices in those areas where they found aggressive competition.

In its final report to the Senate on its chainstore investigation, FTC stated in its opinion that:

> "A simple solution for the uncertainties and difficulties of enforcement would be to prohibit unfair and unjust discrimination in price and leave it to the enforcement agency, subject to review by the courts, to apply that principle to particular cases and situations. The soundness of and extent to which the present provisos would constitute valid defenses would thus become a judicial and not a legislative matter." [433]

[432] Directed by S. Res. No. 24, 79th Cong., 1st sess.
[433] Final report of the FTC on chainstore investigation, S. Doc. No. 4; Dec. 13, 1934, 74th Cong., 1st sess., p. 96.

Among the expert witnesses who testified at the 1955 hearings was Professor Holbrook Working of Stanford University. He provided a refutation to the specious argument that discriminatory practices are not anticompetitive from the viewpoint of economists. Dr. Working stated: [9a]

> Consider why the theory of perfect competition was constructed. Its purpose was to analyze the effects of competition under conditions which are somewhat artificially simplified for purposes of analysis but which were supposed to

[9a] House Report No. 2966 (84th Cong., 2d Sess.), p. 220.

> fairly well approximate actual or attainable conditions in a considerable part of the economy. The results of this analysis were to show that competition of the sort considered had desirable results. Among those results that were considered desirable are some that depend directly on absence of price discrimination. The belief that price discrimination tends to be objectionable runs as a thread through all the history of economic thought on the effects of competition. Any implication that economists have held only that price discrimination was objectionable under the peculiar and special conditions of perfect competition, and under those conditions only, is untrue.

Now, what is the real economic significance of price discriminatory practice? During the course of these hearings, the Ad Hoc Subcommittee had the benefit of receiving the testimony of eminent professors of economics such as Dr. Robert C. Brooks, Jr., of Vanderbilt University,[10] Dr. Vernon A. Mund of the University of Washington,[11] and Dr. Ronald H. Wolf of the University of Tennessee. [12]

Their testimony coincided with testimony of other witnesses from the Federal Trade Commission and businessmen who have had decades of experience in dealing with factual situations involving the acts and practices of price discrimination. In addition, the Ad Hoc Subcommittee has the benefit of reviewing, considering and utilizing the testimony heretofore received by the House Small Business Committee from numerous scholars and experts concerning the economic significance of the acts and practices of price discrimination.

In addition to this abundance of testimony from truly outstanding experts in the service of economics and of attorneys who have served for many decades as public servants in dealing with the practice of price discrimination as above outlined, the Ad Hoc Subcommittee also has had the benefit of reviewing and considering findings of fact by the Federal Trade Commission and by the Courts in hundreds of litigated and judicially decided cases arising under the Robinson-Patman Act. These have not only included the cases referred to by the Honorable Earl W. Kinter,[13] but also the cases of *Utah Pie Company* v. *Continental Baking Company*,[14] *Federal Trade Commission* v. *Morton Salt Company*,[15] *Federal Trade Commission* v. *Cement Institute, et al*,[16] as well as other Federal cases. It has become clear that opponents of the Robinson-Patman Act are against it because that law prohibits price discriminations, including such price discrimination practices that destroy competition.[17]

Assistant Attorney General Thomas E. Kauper and his Deputy, Joe Sims, principle proponents for the proposals to repeal the Robinson-Patman Act, acknowledged in their testimony and in an analysis that was submitted in response to a request from the Ad Hoc Subcommittee that their proposals would effectively get rid of some of the provisions

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[10] Hearings, pt. 1, beginning at p. 421.
[11] Hearings, pt. 3, beginning at p. 42.
[12] Hearings, pt. 3, beginning at p. 61.
[13] Hearings, pt. 1, pp. 265–273.
[14] 386 U.S. 685 (1967).
[15] 334 U.S. 37 (1948).
[16] 333 U.S. 683 (1948).
[17] See H. Rep. 2966 (84th Cong., 2d Sess.), pp. 21–33.

of the law upon which certain important antitrust cases have been based.[18]

REPLY TO THE ARGUMENT THAT THE ROBINSON-PATMAN ACT PROHIBITS BACKHAUL

Opponents of the Robinson-Patman Act have made arguments that the Act prohibits sellers of food and other merchandise from permitting buyers to send their trucks to the sellers' loading platforms to pick up loads in the trucks that would be returning empty their backhaul run. This argument reached a crescendo in late 1973 when the fuel crisis arose, it was then said that the Robinson-Patman Act and the Federal Trade Commission precluded savings in vital fuels and contributed to inflation by preventing, in many instances, buyers from effecting loaded trucks on backhaul.

All of such arguments pointed to Advisory Opinion No. 147 of the Federal Trade Commission,[19] dated October 24, 1967. There the Federal Trade Commission, in response to a shipper of food items, provided advice that if the seller in his use of a delivered pricing formula permitted customers to pick up items at the sellers' loading platforms and then varied his allowances according to the delivered pricing formula, questions might arise as to whether these differences in the net prices paid would violate provisions of the Robinson-Patman Act. Thereafter, the sellers chose to neither eliminate their delivered pricing formula nor permit buyers to load trucks at the sellers' platforms. Thereupon, representatives of the largest and the most powerful food chain retailing store corporations organized a campaign of criticism against the Robinson-Patman Act and the Federal Trade Commission alleging the prevention of savings on transportation of food and savings of vital fuel for transportation.

Leaders of this campaign urged the Federal Trade Commission and other high Government officials to persuade the Federal Trade Commission to discard its advisory opinion that discriminatory pricing practices which could result from the plans these campaigners for the big food retail chain store organizations had in mind would or could lead to violation of law.

The following colloquy took place at the Ad Hoc Subcommittee hearing [20] between its Special Counsel and Bartley T. Garvey, Esquire, of the Federal Trade Commission:

> Among the arguments that were raised by Mr. Ginsburg and Mr. Feldman in their communication was that there would be a saving in fuel and a saving in transportation services if the Commission should abandon its position that it had stated in Advisory Opinion 147, wasn't it?
>
> Mr. GARVEY. I believe that is included in the letter, yes, sir.
>
> Mr. MACINTYRE. Now in connection with their urging, they went to the Cost of Living Council and to the Commerce Department, that is, Mr. Dent, and also to the Department of Transportation for assistance, didn't they?

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[18] Hearings, pt. 1, pp. 617–619.
[19] See Special Subcommittee on Small Business and the Robinson-Patman Act, hearings (91st Cong., 2d sess., 1970) Vol. 3 Appendix, pages 135–136.
[20] Hearings, pt. 2, pp. 192–195.

Mr. GARVEY. Well, I don't know of that of my own knowledge. There are references to the Cost of Living Council and to certain other Government agencies. As to who went to who, I have no recollection of it from this letter.

Mr. MACINTYRE. Attached to this document and letter of January 31, 1973, to which we have already made reference, there is an attachment known as SMR logistics committee. Do you recall seeing that as a part of that letter?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. That was a committee formed to help prepare for the arguments and present the arguments on behalf of the people who were moving for the Commission to abandon its advisory opinion, wasn't it?

Mr. GARVEY. It is a committee known as the SMI Logistics Committee and it is my understanding that SMI means Super Marketing Institute or something of that nature.

Mr. MACINTYRE. But the committee was arranged for the purpose of preparing arguments and presenting them on behalf of those urging that the Commission abandon that advisory opinion 147, wasn't it?

Mr. GARVEY. I think that is suggested from this letter.

Mr. MACINTYRE. On this logistics committee, there was a representative from Kroger Food Stores?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. From Jewel Food Stores?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. From the Great Atlantic & Pacific Tea Co.?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. From the Stop & Shop Cos.?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. And Mr. Louis Fox was a member of it, wasn't he, of the Associated Wholesale Grocers?

Mr. GARVEY. Yes.

Mr. MACINTYRE. The Bohack Corp., in the second column? The Flemming Foods, Lucky Stores, Allied Supermarkets?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. Do you know what the total sales of those were in Fortune's Fifty Largest Merchandisers for 1975?

Mr. GARVEY. No; I would not know that but I imagine it would be extremely substantial.

Mr. MACINTYRE. Following this, what did the Commission do?

Mr. GARVEY. Following the receipt of this particular letter?

Mr. MACINTYRE. This and other letters from the Cost of Living Council and other agencies of the Government.

Mr. GARVEY. My understanding of what the Commission did is somewhat limited as it was handled in the General Counsel's Office.

I was not in the General Counsel's office at that time. But from a review of the file it would appear that the Commission prior to the receipt of this letter had already considered the problem of backhaul and whether or not advisory opinion 147

should or should not be rescinded and continued to consider it throughout the year 1973.

Mr. MACINTYRE. But on December 26, 1973, it did issue a clarifying statement on this, didn't it?

Mr. GARVEY. Yes, sir, it did.

Mr. MACINTYRE. Let me read a sentence from that and ask if you remember. This is in the press release covering it.

"In its clarifying statement the Commission expressed the view that questions probably would not arise under the laws administered if sellers using valid, uniform, zone delivered pricing systems offered to all customers on a non-discriminatory basis in lieu of a delivered price the option of purchasing at a true f.o.b. shipping point price."

Mr. GARVEY. Yes, sir; I remember that statement.

Mr. MACINTYRE. In your judgment that is the substance of the Commission's clarifying statement as issued on December 26, 1973, regarding this?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. That did not end the controversy, did it?

Mr. GARVEY. No, sir, it did not. There were considerable questions and discussions raised after that.

Mr. MACINTYRE. Mr. Lewis Engman sent this letter to the Secretary of Commerce, Mr. Dent. Do you recall that?

Mr. GARVEY. I am not sure I recall that.

There were a large number of letters of that nature.

Mr. MACINTYRE. But, the argument continued and the Commission issued a further statement to Mr. Albert Rees of the Cost of Living Council on October 9, 1973, didn't it?

Mr. GARVEY. That is correct. It also issued a statement in March of 1975.

Mr. MACINTYRE. I have here what purports to be a copy of the letter of October 9, 1975, to the Honorable Albert Rees, Director of the Council on Wage and Price Stability where the Commission has suggested its clarification and its meaning and it says this in the last paragraph. Do you recall the correspondence that led up to this?

"You further recommend that the Commission shall adopt a policy—to each customer. On such a policy, your letter urges can be based on the premise that the Robinson-Patman Act does not mandate uniformity as to f.o.b. prices because that act permits a seller to offer different prices where justified by different costs."

Mr. MACINTYRE. Do you remember that statement?

Mr. GARVEY. Yes.

Mr. MACINTYRE. He wanted the Commission to approve a plan that would permit these large backhaul customers to pick up their goods and to give them any cost savings that they, themselves, could effect beyond what the uniform price would be, nondiscriminatory price would be at the shipping point. Isn't that a way of stating it?

Mr. GARVEY. What he was saying was that in his view, the distance that a customer was from the shipping point could

reflect the amount of discount that he would get from a uniform delivered price in his interpretation of the Robinson-Patman Act.

Mr. MACINTYRE. Well——

Mr. GARVEY. I have that section of Dr. Rees' letter before me at the moment if you would like me to read it.

Mr. MACINTYRE. All right.

Mr. GARVEY. I quote the March 19 letter—that reference is to the Commission's previous statement.

"Requires that the f.o.b. price offered to all f.o.b. customers be 'uniform,' that is, be the same dollar amount in each case. It does not permit the seller to offer backhaul allowances that vary in accordance with the cost of transportation to each customer. This requirement of uniformity places a substantial restraint upon the development of backhauling—a restraint not mandated by the Robinson-Patman Act, which permits the seller to offer different prices when justified by different costs."

Mr. MACINTYRE. But the Commission said it would approve and in effect was approving a nondiscriminatory pickup price for any backhauler who wanted to pick it up and without any thought of anybody violating a law in doing so?

Mr. GARVEY. That is correct.

Mr. MACINTYRE. This would permit backhauls by all customers on that basis?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. Equality?

Mr. GARVEY. That is correct.

From the foregoing it is seen that neither the Robinson-Patman Act nor the Federal Trade Commission prevents sellers from permitting customers to load their empty trucks at the sellers' loading platforms for backhaul runs provided that the price charged all customers is on the basis of equality and is non-discriminatory. Of course, that would not provide for a seller to allow a big buyer a large amount off that price to cover the buyer's cost of transporting the truck load of merchandise from the seller's platform to the buyer's place of business, and at the same time give a less or no allowance from the platform price to a small buyer whose truck was loaded at the same platform, but which traveled a shorter distance to the buyer's place of business. After all, after the buyers purchase the merchandise and load it on their trucks at the sellers' loading platforms, the amount of cost involved and incurred by each buyer in handling, transporting and in reselling that merchandise do not appear to be matters that would justify sellers to discriminate in the price they charge the buyers for the merchandise at their loading platforms.

REPLY TO ARGUMENTS MADE AGAINST SUBSECTION 2(C) OF THE ROBINSON-PATMAN ACT

Frequently, arguments are made against Subsection 2(c) of the Robinson-Patman Act. That subsection is as follows:[21]

[21] 15 U.S.C. 13(c).

(c) *Payment or acceptance of commission, brokeage or other compensation*

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The argument is made that subsection 2(c) requires a seller to employ brokers to sell his goods and to avoid direct sales to the buyer. There is not one word in subsection 2(c) which by any stretch of the imagination could be said to require a seller to employ brokers to sell his goods. In fact, any seller may sell his goods directly and without the employment of any intermediary. An analysis of what Congress said and did about this subsection would be helpful.

During the Ad Hoc Subcommittee's hearing on November 5, 1975, the late Wright Patman, the co-author of the Robinson-Patman Act, personally appeared and testified. At that time, it was brought out that subsection 2(c) of the law was enacted to remove unfair and discriminatory practices which could not be reached by subsection 2(a), inasmuch as subsection 2(a) merely prohibited price discriminations. It was pointed out that in the course of investigations Congressman Patman had conducted prior to the passage of the Act which bears his name in part, it was ascertained that a subsidiary corporation of the A & P Tea Company, namely the Atlantic Commission Company in New York, was formed as a broker to "render services" to the sellers and collect brokerage fees for such services. The truth, however, was that this Atlantic Commission Company was, in fact, handling the transactions for its parent—the A & P, which was really the buyer.[22]

The Congress, in its consideration of the problem, sought to eliminate such unfairness. The following is a quotation from a report [23] of the House Committee on the Judiciary:

> * * * The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. Which method is chosen depends presumptively upon which is found more economical in the particular case; but whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since such sales must

[22] Ad Hoc Subcommittee hearings, pt. 1, pp. 14–15.
[23] House Report No. 2287 (74th Cong., 2d sess., 1936) pp. 13–14.

bear instead their appropriate share of the seller's own selling cost.

Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker", so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, would render the section a nullity. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume.

All Section 2(c) does is to prohibit any buyer—whether a chain store, a voluntary or independent, corner wholesaler or retailer—from demanding and receiving a price discrimination which has no justification but which is sought under the pretense, the subterfuge, that it is compensation paid by the seller to the buyer for a sales service rendered by the buyer to the seller in the sale of the goods by the seller to the buyer. All Section 2(c) does is to prohibit coercive mass buyers from getting such an unfair and deceitful price discrimination as will destroy the opportunity of other buyers to compete with them. In thus preserving equality of opportunity to compete with one another, Section 2(c) profits none but the American people.

The Federal Courts have time and again exposed the subterfuge of paying brokerage allowances to buyers or their intermediaries. They have shown that these allowances are, in fact, unwarranted and abusive price discriminations which violate law. The Section 2(c) brokerage prohibition has proven 100% enforceable, has withstood every conceivable challenge that it is unconstitutional, and has proven entirely adequate to reach not only buyers and intermediaries directly controlled by buyers, but intermediaries indirectly controlled by buyers as well.

In every case carried by mass buyers to the Circuit and Supreme Courts of the United States, for purposes of challenging the constitu-

tionality of Section 2(c), the courts have upheld the purpose and enforcement of Section 2(c). In every case, the courts have clearly understood the spirit as well as the letter and legal meaning of Section 2(c). In every case the courts have upheld the enforcement orders of the Federal Trade Commission enforcing Section 2(c), and have established beyond all reasonable doubt in their decisions that the language of Section 2(c) is adequate to enforce the purpose of Congress and that Section 2(c) is constitutional.[24]

As did Congress, the courts have pierced the spurious veil of the brokerage allowance method of price discrimination—have unmasked it for the real subterfuge that it is; namely, an unwarranted and abusive price discrimination, available to coercive buyers only, to the competitive detriment of the thousands of independent buyers who lack the requisite coercive power. And, the Courts have repeatedly and rationally affirmed and enforced the intent of Congress that such price discriminations shall not be permitted to buyers or buyer-controlled intermediaries on the phony claim of being legitimate compensation for services rendered by them. Thus, in the *Biddle* case, the Court said:

> Antitrust laws regulate monopolistic practices which are repugnant to decent business morality, which are injurious to competitors and to consumers, which are economically wasteful. * * * (p. 689)

REPLY TO THE ARGUMENT THAT SUBSECTIONS 2(d), 2(e) OF THE ROBINSON-PATMAN ACT PREVENT COOPERATIVE ADVERTISING ALLOWANCES

The Robinson-Patman Act, subsections 2(d) and 2(e), are as follows:[25]

> (*d*) *Payment for services or facilities for processing or sale.*
>
> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> (*e*) *Furnishing services or facilities for processing, handling, etc.*
>
> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the

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[24] *Biddle Purchasing* v. *FTC*, 96 F. 2d 687 (2nd CCA, 1938), cert. den. 305 U.S. 634; *Oliver Bros.* v. *FTC*, 102 F. 2d 763 (4th CCA. 1939); *Great A & P Tea Co.* v. *FTC* 106 F. 2d 667 (3rd CCA, 1939), cert. den. 308 U.S. 625; *Webb-Crawford Co.* v. *FTC*, 109 F. 2d 268 (5th CCA, 1940), cert. den. 310 U.S. 638; *Quality Bakers of America* v. *FTC*, 114 F. 2d 393 (1st CCA, 1940); *Modern Marketing Service* v. *FTC*, 149 F. 2d 970 (7th CCA, 1945); *FTC* v. *Herzog*, 150 F. 2d 450 (2nd CCA. 1945); *Sonthgate Brokerage Co.* v. *FTC*, 150 F. 2d 607 (4th CCA. 1945), cert. den. 326 U.S. 774; *Independent Grocers A. D. Co.* v. *FTC*, 203 F. 2d 941 (7th CCA. 1953).

[25] 15 U.S.C. 13(d) and 15 U.S.C. 13(e).

> furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

There has been criticism at times to the effect that the Federal Trade Commission in its enforcement of the Robinson-Patman Act against those who fail to make cooperative advertising allowances on proportionately equal terms was, in fact, acting to prevent cooperative advertising allowances. The facts do not support the argument; indeed, the provisions of the law do not authorize or empower the Federal Trade Commission or any other party to use subsections 2(d) and 2(e) to prevent cooperative advertising allowances. Those provisions merely provide that when a seller engages in cooperative advertising arrangements with his customers, he must make those arrangements so as to provide for advertising allowances on proportionately equal terms. For example, the seller had two customers in an area competing with each other and one customer purchased merchandise in the volume of $100,000 in a particular trading period and received a cooperative advertising allowance of $10,000 and the second customer purchased $50,000 in volume of merchandise, then it would be incumbent upon the seller to offer that second customer an advertising allowance of $5,000. Many of the larger buyers have argued for more. They have argued that the provisions of the Robinson-Patman Act in question, if enforced by the Federal Trade Commission, would destroy all arrangements for cooperative advertising allowances. The Commission did not agree with that argument and has issued several hundred complaints against sellers and the proceedings resulted in the issuance of cease and desist orders prohibiting the sellers from making cooperative advertising allowances except on proportionately equal terms to competing buyers.[26]

A typical situation expected to be dealt with under subsections 2(d) and 2(e) is that of the *Elizabeth Arden Case* previously discussed herein by the Honorable Earl W. Kintner, former Chairman of the Federal Trade Commission. In that connection, he explained the significance of subsections 2(d) and 2(e) and the application of that law to the *Elizabeth Arden Case* as follows:[27]

> "Mr. KINTNER. Well, I summarized my comments on this case by saying that: "*Elizabeth Arden* represents a classic example of why sections 2 (d) and (e) should be retained, in that the promotional services furnished had a demonstrably significant effect upon sales, and thus competition." The whole thing is that large stores would be able to induce suppliers of cosmetics to give them live demonstrators, and that is a great service. It encourages people to come in and to patronize the large department store. But what about the little store down on the corner that has the same cosmetics and no demonstrator? They fall farther and farther behind in the competitive race, simply because they are not receiving equal treatment.

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[26] Ad Hoc Subcommittee Hearings, pt. 3, pp. 231–274 (see the testimony of Francis C. Mayer, an attorney in the Bureau of Competition, FTC, who has served many years as a supervisor of attorneys handling cases involving Robinson-Patman Act matters.

[27] Hearings, pt. 1, p. 274.

So, the Commission and the Courts have said, with respect to these services or facilities that are furnished, that if you cannot—if the small store or small buyer cannot fundamentally use the facility or service that the larger buyer is able to use——

Mr. MACINTYRE. Such as a demonstrator?

Mr. KINTNER. Such as a demonstrator, and you obviously could not have a full-time demonstrator in a corner drugstore. But you furnish something else that is proportional, a service or facility that they can use and that is reasonably proportional to the purchases of the customer.

Mr. MACINTYRE. To use a phrase of the FTC, it was a "suitable substitute" I believe.

Mr. KINTNER. Yes, sir. * * *"

ROBINSON-PATMAN AND THE CONSUMER

In connection with the charge made by certain critics of the Robinson-Patman Act that enforcement of the Act is anti-consumer and that the Act tends to rigidity in pricing, the testimony adduced at the hearings of the Ad Hoc Subcommittee clearly is to the contrary.

The consumer is best served by having numerous competing businesses in a market none of which is permitted to gain an unfair competitive advantage because of superior market power. Effective competition depends on many firms sufficiently strong to compete vigorously with each other on equal terms or near equal terms. Discriminatory competitive advantages unfairly strengthen powerful firms and debilitate and weaken, or even destroy, their smaller rivals. Consumers gain no advantage by according unfair competitive protection to the large and powerful while depriving small enterprises a fair chance to compete.

The words of the Honorable Elizabeth Hanford Dole, a member of the Federal Trade Commission, which are contained in a statement to the Ad Hoc Subcommittee, are particularly important; they are as follows: [28]

> There are, I think, important consumer interests in preserving a viable competitive small business presence in the marketplace. The antitrust laws would, in my judgment, be seriously deficient if they failed to prevent the type of territorial price discriminations which could, over time, substantially weaken competitors of the discriminating supplier. Selective price predation may, in some instances, be used as a method of intimidating existing competitors or discouraging entry by potential competitors; and this, in my opinion, impairs, rather than promotes, the full interplay of free market forces. Smaller firms may either be financially unable to survive periods of sustained predation or, if they do survive, they may be inclined to submit to price leadership out of fear of retaliation or become reluctant to otherwise engage in vigorous competitive activities. Moreover, at various levels in the chain of distribution, many types of discrimination by a supplier

[28] Hearings, pt. 3, p. 78.

> among its competing customers may, under certain circumstances, have adverse consequences, the net effect of which may be a decline in the competitive health of a particular market. It is of concern to me that reduced competition today may translate into reduced consumer welfare in the future.

The furtherance of public policy through strict enforcement of the Robinson-Patman Act and other antitrust laws is not only the principal means of affording relief to small entrepreneurs from the ravages of price discriminations, but is also in the interest of consumers. It is a truism that everyone must perforce be a consumer also, whether he be a businessman, a laborer, a manufacturer, or engaged in any profession or calling.

The then Executive Director of the Consumer Federation of America, Erma Angevine, at a 1970 Congressional hearing testified that the consumer needs small business and that the well-being of consumers is indeed dependent on the economic well-being of small business.[29] She further stated: [30]

> I have heard it said by the champions of emasculation that the real effect of the Robinson-Patman Act is to effect price rigidity and to preclude aggressive competition. Taken literally, there is a measure of truth in these assertions. Without the Robinson-Patman Act, I can readily envision an abbreviated period of aggressive price wars. I said abbreviated, because the competition will last only so long as it takes the corporate giants to free themselves of competition, and thereafter they will sock it to the consumer, who will be left without alternative sources.

Dr. Vernon A. Mund, Professor of Economics, Emeritus, University of Washington, correctly characterized price discrimination and monopoly as "Siamese twins" and in his testimony said: [31]

> The higher price, of course, reflects the seller's monopoly power as the basis for making the lower price. Many people look at only the lower price. They say this is good. As two Justices of the Supreme Court said, "Lower prices are the very hallmark of competition." They do not see that the lower prices have, as their offset, higher prices elsewhere. This view essentially is equivalent to saying that the Earth is flat and looking at it, it looks that way.

The Robinson-Patman Act is a law that is of vital importance to consumers everywhere.

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[29] Hearings, pt. 3, p. 357.
[30] Hearings, pt. 3, p. 340.
[31] Hearings, pt. 3, p. 43.

Chapter XIV. Findings and Conclusions

The Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives, finds and concludes that:

1. The Robinson-Patman Act, which is an important part of the antitrust laws of the United States, should not be repealed nor emasculated nor weakened in any way whatsoever; neither should it be amended. However, in order to provide additional leverage in furtherance of the beneficient purposes of this time-proven law, Section 3 of the Robinson-Patman Act should, by Congressional action, be included within the term "antitrust laws."

2. The Robinson-Patman Act has implemented the clearly expressed national public policy "* * * that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise * * *." Therefore, the Robinson-Patman Act must be effectively enforced by those Governmental agencies which are charged with the duty to execute and enforce its provisions.

3. "Regulation," as that term is normally used by this and other Congressional committees, means supervisory control by an administrative body that substitutes for the impersonal control of the free market. In that sense, neither the Robinson-Patman Act nor other provisions of law making it illegal to use price discriminatory acts or practices are regulations of business. The antitrust laws, of which the Robinson-Patman Act is an integral part, do not require the promulgation of regulations to control business activities. The antitrust statutes merely require that business avoid such acts and practices which restrain, injure, damage, or destroy small business through price discriminatory practices or tend to create a monopoly. The provisions of the Robinson-Patman Act call for no paperwork on the part of businessmen who comply with the spirit and intent of the law. Calling one thing or law by a different name cannot possibly change the true character of that thing or statute.

4. It appears that certain special interests who oppose the antitrust laws, including the Robinson-Patman Act, have mounted strong and vigorous campaigns, including lobbying activities and making erroneous charges to the effect that the Robinson-Patman Act impedes competition. Such activities and allegations were made by these special interests and others in their efforts to weaken or repeal the Robinson-Patman Act which together with the other antitrust laws are, in fact, a basis for economic freedom of Americans. Therefore, vigilance is needed and prompt action required to oppose these special interest groups and other individuals who would like to emasculate or even do away with such needed laws.

5. The unfounded, erroneous and unjustified allegations made against the antitrust laws in general, and against the Robinson-Pat-

man Act specifically, have had the ill effects of confusing citizens and governmental officials and misleading them into the belief that those laws against price discrimination practices destructive of competition are anticompetitive and undesirable and should be repealed.

6. The lobbying activities and unjustified allegations made against the Robinson-Patman Act had the further unfortunate effect of persuading or leading some public officials who are charged with the duty, responsibility, and obligation to enforce this law, to refrain from its full and complete enforcement with the result that the Congressional intent is thwarted and a bureaucratic repeal effected. The Ad Hoc Subcommittee condemns such lobbying activities on the part of special interest groups as well as others so lobbying.

Chapter XV. Recommendations

The Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives, makes its recommendations based on its investigations, the testimony heard, and other evidence presented to and developed at its hearings regarding "Recent Efforts to Amend or Repeal the Robinson-Patman Act." These recommendations are as follows:

A. To the Executive Branch of the Government:

(1) That neither it nor any of its Departments consider nor take any action on proposals to weaken, emasculate, or repeal the Robinson-Patman Act or other provisions of Federal laws against price discrimination practices which may injure, lessen, or destroy competition.

(2) That it, through its appropriate Departments and agencies, fully and effectively enforce the Robinson-Patman Act and all antitrust laws and other statutes to aid and assist the small business sector of the American economy, and thereby comply with the express mandate of the Congress.

B. To the independent and administrative agencies:

That every independent administrative or regulatory agency of the Government which is charged with the duty to enforce the Robinson-Patman Act, and other statutes and laws designed to preserve the free enterprise system and to keep small business as a viable and essential element of American society, should completely and fully administer and enforce all the provisions of the United States Code over which each such agency has jurisdiction.

C. To the Congress of the United States:

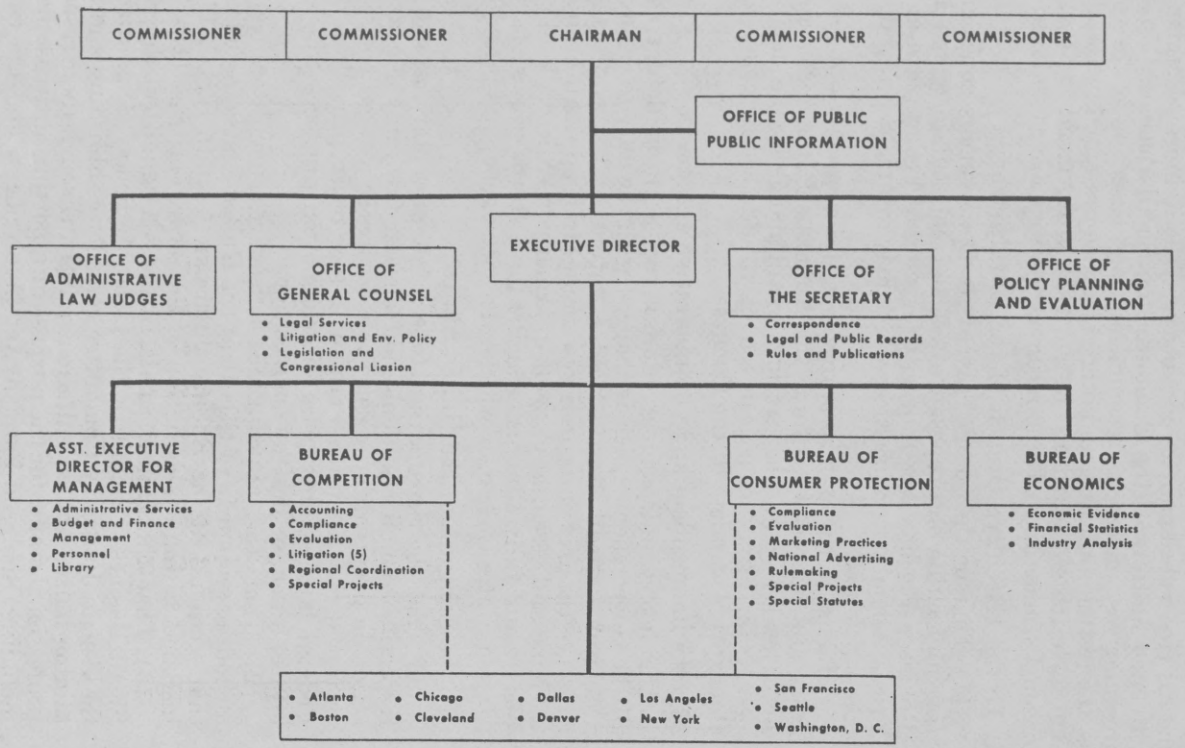
(1) That the Senate, the House of Representatives, and their respective committees should not consider favorably nor take any action on proposals or legislative measures to weaken, emasculate, or repeal the Robinson-Patman Act or other provisions of the Federal laws against price discrimination practices which may injure, lessen, or destroy competition.

(2) That the appropriate legislative committees consider amending section 12 of title 15 of the United States Code in order that section 3 of the Robinson-Patman Act (15 U.S.C. 13a) be included within the definition of the term "antitrust laws."

(3) That the House Small Business Committee, the Senate Small Business Committee, the House Judiciary Committee, and the Senate Judiciary Committee consider establishing and maintaining liaison and consultations jointly, through their respective professional staffs, for the purpose of reporting antitrust matters, including Robinson-Patman Act involvement, and the enforcement of laws when such matters or statutes may have an impact upon small business, giving due regard to the National public policy as stated in the Small Business Act as codified in 15 U.S.C. 631.

FEDERAL TRADE COMMISSION

ORGANIZATION CHART



January 1976

Federal Trade Commission
Appropriations History
FY 1966 - FY 1975

(dollars in thousands)

	Request to Congress	Amount Appropriated	Actual Expenditures	Maintaining Competition Expenditures	Percent of Total Expenditures
FY 1966.....	$14,088	$13,862	$13,671	$7,136	52.2%
FY 1967.....	14,387	14,378	14,305	7,208	50.4
FY 1968.....	15,356	15,281	15,280	6,979	45.7
FY 1969.....	17,177	16,900	16,805	7,688	45.7
FY 1970.....	21,829	20,889	20,786	8,421	40.5
FY 1971.....	23,615	22,490	22,470	7,599	33.8
FY 1972.....	25,189	25,189	25,078	8,042	32.1
FY 1973.....	26,8	28,974	27,565	6,855	22.2
FY 1974.....	32,236	32,496	32,103	9,427	29.4
FY 1975.....	38,998	37,898 1/	38,998 (Est.)	12,839 (Est.)	32.9

1/ As of May 30, 1975 (October 1974 pay raise supplemental pending).

Note: Fiscal years 1966 through 1972 contain, in the Maintaining Competition Expenditures, substantial portions of the resources of the Bureau of Economics and the Regional Offices. In fiscal year 1973, the Economic Activities mission was created and a large part of the Bureau of Economics resources have been allocated to the new mission; the reduction to a certain extent in Maintaining Competition mission resources is accounted for by this fact.

FEDERAL TRADE COMMISSION
Personnel Statistics
FY 1966 - FY 1975

	Total FTC Personnel	Employees Engaged in Antitrust*
FY 1966	1,136	599
FY 1967	1,172	573
FY 1968	1,237	575
FY 1969	1,218	563
FY 1970	1,372	565
FY 1971	1,388	518
FY 1972	1,417	497
FY 1973	1,595	387
FY 1974	1,590	372
FY 1975	1,613 (Est.)	503 (Est.)

* Maintaining Competition Mission

BUREAU OF COMPETITION

FORMAL INVESTIGATIONS - ROBINSON PATMAN ACT

	Initiation	Disposition			
		Complaint	AVC	Closed	Total
1965	75	80	20	485	585
1966	81	6	36	333	375
1967	159	8	50	107	165
1968	73	14	14	46	74
1969	53	4	15	101	120
1970	36	5	21	152	178
1971	18	8	6	31	45
1972	9	1	2	19	22
1973	5	1	-	17	18
1974	8	6	-	21	27

Federal Trade Commission
Robinson-Patman Orders Since the Finality Act
Fiscal Year 1960

Fiscal Year	Orders Under Section 2(a)
1960	5
1961	11
1962	11
1963	7
1964	28
1965	5
1966	5
1967	8
1968	3
1969	3
1970	6
1971	5
1972	1
1973	1
1974	1
1975	2

Federal Trade Commission
Robinson-Patman Orders Since the Finality Act
Fiscal Year 1960

Fiscal Year	Orders Under Section 2(c)
1960	6
1961	56
1962	37
1963	17
1964	1
1965	1
1966	0
1967	1
1968	6
1969	6
1970	0
1971	0
1972	2
1973	2
1974	0
1975	2

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Federal Trade Commission
Robinson-Patman Orders Since the Finality Act
Fiscal Year 1960

Fiscal Year	Orders Under Section 2(d)
1960	33
1961	18
1962	24
1963	225
1964	81
1965	32
1966	65
1967	9
1968	2
1969	0
1970	2
1971	6
1972	1
1973	0
1974	2
1975	0

Federal Trade Commission
Robinson-Patman Orders Since the Finality Act
Fiscal Year 1960

Fiscal Year	Orders Under Section 2(e)
1960	1
1961	1
1962	2
1963	2
1964	4
1965	0
1966	0
1967	1
1968	1
1969	0
1970	0
1971	3
1972	0
1973	0
1974	0
1975	1

Federal Trade Commission
Robinson-Patman Orders Since the Finality Act
Fiscal Year 1960

Fiscal Year	Orders Under Section 2(f)
1960	1
1961	4
1962	1
1963	1
1964	2
1965	0
1966	2
1967	0
1968	1
1969	1
1970	0
1971	1
1972	0
1973	0
1974	0
1975	0

Appendix B.—Tabulation of Antitrust Cases Filed Fiscal Years 1960–75, Government and Private Cases

INCREASING ANTITRUST LITIGATION

Federal law cases in fiscal 1975 * * *. Filing of new federal antitrust law cases continued to boom in fiscal year 1975, according to the annual report of the Director, Administrative Office of the United States Courts, which includes a 16-year comparison for such cases. Briefly, here are the statistics:

Private antitrust filings increased by 172, totalling 1,334 (not including multidistrict transfers).

Criminal cases filed by the Department of Justice reached 36, up from 24 the year before and the highest number in the report's 16-year survey.

Government civil cases numbered 56.

A 13 percent overall increase in antitrust filings roughly matched the growth rate of all federal filings under all laws, according to the report. Following is the 16-year antitrust case comparison:

ANTITRUST CASES COMMENCED, FISCAL YEARS 1960 THROUGH 1975

Fiscal year	Total	Government cases		Private cases	
		Civil	Criminal	Electrical equipment industry	Other
1960	315	60	27	----------	228
1961	441	[1] 42	21	37	341
1962	2,079	[1] 41	33	1,739	266
1963	457	[1] 52	25	97	283
1964	446	59	24	46	317
1965	521	38	11	[2] 29	443
1966	770	36	12	[3] 278	444
1967	598	39	16	[3] 7	536
1968	718	48	11	----------	659
1969	797	43	14	----------	740
1970	933	52	4	----------	877
1971	1,515	60	10	----------	[4] 1,445
1972	1,393	80	14	----------	[5] 1,299
1973	1,224	54	18	----------	[6] 1,152
1974	1,294	40	24	----------	[7] 1,230
1975	1,467	56	36	----------	[8] 1,375

[1] Includes 9 U.S. electrical industry cases filed in 1961, 2 in 1962, and 3 in 1973.
[2] Includes 26 cases transferred under 28 U.S.C. 1404(a).
[3] All cases were transfers under 28 U.S.C. 1404(a).
[4] Includes 442 antitrust cases transferred under 28 U.S.C. 1407.
[5] Includes 96 antitrust cases transferred under 28 U.S.C. 1407.
[6] Includes 63 antitrust cases transferred under 28 U.S.C. 1407.
[7] Includes 68 antitrust cases transferred under 28 U.S.C. 1407.
[8] Includes 41 antitrust cases transferred under 28 U.S.C. 1407.

ADDITIONAL VIEWS OF HON. M. CALDWELL BUTLER, HON. THOMAS N. KINDNESS, AND WILLIAM F. GOODLING

While we are generally inclined to concur with the report on the Robinson-Patman Act, we do have reservations concerning certain findings, conclusions, and recommendations, and we do not believe adequate testimony was developed at the Ad Hoc Subcommittee's hearings enable the Ad Hoc Subcommittee to render a fair, objective or impartial report. Basically, we believe that the Robinson-Patman Act, when enforced effectively, can be a viable instrument in protecting small businesses from unfair price discrimination, but we also believe that when a Congressional Subcommittee undertakes the evaluation of existing legislation, and its enforcement, it should be done from an objective and impartial point of view. Based upon preconceived notions about the Robinson-Patman Act, that opportunity was not afforded the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters.

The hearings held before the Ad Hoc Subcommittee were so one-sided as to make it impossible to believe anyone can honestly think otherwise. Thirty non-government witnesses appeared before the Ad Hoc Subcommittee and not one of them advocated weakening or repealing the Robinson-Patman Act. Yet efforts to weaken or repeal the act was why the Ad Hoc Subcommittee was constituted in the first place. How an objective study can be made of anything, let alone a controversial piece of legislation, by only hearing from one side is beyond our understanding.

The "Findings and Conclusions" state:

> 4. It appears that certain special interests who oppose the antitrust laws, including the Robinson-Patman Act, have mounted strong and vigorous campaigns, including lobbying activities and making erroneous charges to the effect that the Robinson-Patman Act impedes competition. Such activities and allegations were made by these special interests and others in their efforts to weaken or repeal the Robinson-Patman Act which together with the other antitrust laws are, in fact, a basis for economic freedom of Americans. Therefore, vigilance is needed and prompt action required to oppose these special interest groups and other individuals who would like to emasculate or even do away with such needed laws.

There was certainly no evidence at the hearings that any "special interests" were mounting "strong and vigorous campaigns" nor did the Ad Hoc Subcommittee ever hear any "special interests" even attempt to make a case for the weakening or repealing of the Robinson-Patman Act. The only ones to appear before the Ad Hoc Sub-

committee who thought the Robinson-Patman Act ought to be weakened or repealed were a handful of Government officials, and if we are to believe the "Findings and Conclusions" of the report, they are confused and misled:

> 5. The unfounded, erroneous and unjustified allegations made against the antitrust laws in general, and against the Robinson-Patman Act specifically, have had the ill effects of confusing citizens and governmental officials and misleading them into the belief that those laws against price discrimination practices destructive of competition are anticompetitive and undesirable and should be repealed.
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> 6. The lobbying activities and unjustified allegations made against the Robinson-Patman Act had the further unfortunate effect of persuading or leading some public officials who are charged with the duty, responsibility, and obligation to enforce this law, to refrain from its full and complete enforcement with the result that the Congressional intent is thwarted and a bureaucratic repeal effected. The Ad Hoc Subcommittee condemns such lobbying activities on the part of special interest groups as well as others so lobbying.

There was no evidence ever presented to the Subcommittee to support the conclusion that Government officials have been confused or misled by anyone. But, even if they were forced into an adversary position when they testified, we are grateful the subcommittee consented to have them appear.

That cannot be said for others who are not favorably disposed to the effects of the Robinson-Patman Act on the economy.

The considerable extent the report goes to in expressing the Ad Hoc Subcommittee's regret that Professors Donald Baker and Kenneth Elzinga, opponents of the Act, were unavailable to testify [1] needs to be understood in the context that their letters of invitation to testify were not received by Dr. Elzinga until 4 days prior to the hearings, and by Mr. Baker until after the hearing.[2] Subsequent invitations sent to them were done so without going through the usual informal procedure of pre-arranging dates convenient for witnesses to testify.

Others who would have given balance to the hearings are Mr. Alan Greenspan, Mr. Alan Ward, and Mr. Miles Kirpatrick, who were invited to testify, but who also received their letters of invitation only days before they were to appear with prepared statements answering questions posed in a 3-page letter.[3]

On the other hand, witnesses in favor of the Robinson-Patman Act, who appeared before the Ad Hoc Subcommittee on the same days Baker, Elzinga, Greenspan, Ward, and Kirkpatrick were to have appared, received their letter of invitation at least 2 weeks in advance of the hearing date and had their prepared testimony to the Ad Hoc Subcommittee before the others even received their invitation.

At our January 26, 1976, hearing Mr. Butler stated: " . . . (W)hat distrubs me is that it seems that those who are friendly to the thrust

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[1] See Report, Chapters XI and XIII.
[2] Hearings (part 3, pp. 303–311.
[3] See Hearings, Part 3, pp. 145, 225.

of these hearings are getting their notice more promptly than those who are not." [4]

It still disturbs all of us!

At the least we would have expected a conscientious effort to have been made to have them back to testify.

The report also concentrates on misstating the Administration's position. The Administration has made no formal proposal; no bill has been presented to Congress asking for amendment or repeal of the Robinson-Patman Act. At most the Justice Department can be accused of exploring some ideas, putting them on paper and testing them in the marketplace. Yet the report condemns even the considering of proposals which would weaken, emasculate or repeal the Robinson-Patman Act and recommends:

> A. To the Executive Branch of the Government—(1) That neither it nor any of its Departments consider nor take any action on proposals to weaken, emasculate, or repeal the Robinson-Patman Act or other provisions of Federal laws against price discrimination practices which may injure, lessen, or destroy competition.
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> C. To the Congress of the United States—(1) That the Senate, the House of Representatives, and their respective committees should not consider favorably nor take any action on proposals or legislative measures to weaken, emasculate, or repeal the Robinson-Putnam Act or other provisions of the Federal laws against price discrimination practices which may injure, lessen, or destroy competition.

Such an attitude lead the Ad Hoc Subcommittee to completely overlook the fact, documented by the Federal Trade Commission, that when the Robinson-Patman Act has been vigorously enforced it has been "targeted disproportionately toward relatively small businesses." [5]

Rather than not considering any proposals, we recommend that the Ninety-fifth Congress make an objective investigation of the Robinson-Patman Act to determine whether a method can be found to ensure that the goals of the Robinson-Patman Act can be effectively enforced to protect small businesses from unfair price discrimination.

Furthermore, we would like to point out that the majority staff of the Ad Hoc Subcommittee took 6 months after the hearings were completed on March 23, 1976 to write their Report, which is inconsistent with Rule 6(B) of the Rules of the Committee on Small Business: [6]

> (B) * * * Hearing records shall be published within 30 days and reports within 60 days after hearings are completed.

We realize there occasionally may be times when a report will necessarily take longer than the 60 days specified by the Committee rules, but this was an Ad Hoc Subcommittee, with only a single issue

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[4] Hearings, Part 3, p. 134.
[5] Hearings, Part 2, p. 147; Part 3, pp. 20–21.
[6] Rules of the Committee on Small Business, U.S. House of Representatives, Ninety-fourth Congress, 1975.

before it, and there is no reason, apparent to us, for taking three times as long to write the Report as the guidelines permit. Delaying the issuing of the Report until the last possible moment and then trying to force it through the Ad Hoc Subcommittee without giving all Members adequate time to thoroughly examine it typifies not only the Report, but the entire set of hearings on recent efforts to amend or repeal the Robinson-Patman Act. We consider it our responsibility to express our disappointment in this regard.

M. CALDWELL BUTLER.
THOMAS N. KINDNESS.
WILLIAM F. GOODLING.

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